132-460

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~320~~. 57

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

VS.

JESSE ROSENTHAL AND SAMUEL ROSENTHAL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 19, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 320.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, IN PLAINTIFF ERROR,

vs.

JESSE ROSENTHAL AND SAMUEL ROSENTHAL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Jesse Rosenthal and Samuel Rosenthal, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened to the great damage of the said William H. Robertson as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings, aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk*.

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 (Indorsed:) 9610. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Jesse Rosenthal & ano., defendants in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within writ of error is hereby admitted this 14 day of May, 1886.

HARTLEY & COLEMAN,
Attorneys for Def'ts in Error.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

3 I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to twenty-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Jesse Rosenthal and Samuel Rosenthal, defendants in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty six, and of the Independence of the United States the one hundred and eleventh.

[SEAL] TIMOTHY GRIFFITH, *Clerk.*

4 *Summons.*

Supreme court of the State of New York, city and county of New York.

JESSE ROSENTHAL & SAMUEL ROSENTHAL,
plaintiffs,
against
WILLIAM H. ROBERTSON, DEFENDANT.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, March 3, 1885.

HARTLEY & COLEMAN,
Plaintiffs' Attorneys,
Office and post-office address, 62 *Wall street, New York City.*

5 (Indorsed:) N. Y. supreme court. Jesse Rosenthal & al., against William H. Robertson. Summons. Hartley & Coleman, plffs. attorneys, 62 Wall street, New York City.

6 *Complaint.*

Supreme court of the State of New York, city and county of New York.

JESSE ROSENTHAL AND SAMUEL ROSENTHAL,
plaintiffs,
against
WILLIAM H. ROBERTSON, DEFENDANT.

Plaintiffs complain:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm name of J. Rosenthal & Company, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiffs in order to obtain said goods were compelled to pay the defendant, as such collector, the sum of one hundred and twenty-four $\frac{20}{100}$ dollars in excess of the lawful rate of duty on said goods and of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiffs made due and timely appeals on each entry, to the Secretary of the Treasury, who affirmed the decision of the defendant upon certain of said entries, and as to the rest, neglected for more than ninety days, as well from the dates of said appeals, as prior to the commencement of this action, to decide said appeals.

6th. That the bills of particulars, hereto annexed, states for each importation separately, the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered; together with the other particulars required by law; and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore, plaintiffs demand judgment against defendant for the sum so exacted as aforesaid with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiffs.

7 *Bill of particulars.*

Importer, J. Rosenthal & Co.

Description of goods.	Vessel and whence imported.	Date of—			Amount of excessive duty.	Date of—	
		Invoice.	Entry.	Payment of excessive duty.		Protest and appeal.	Decision.
1. Pins and hair-pins, 48525.	Donau, from Bremen	1884. June 9	1884. July 5	1884. July 5–30	$82.80	1884. July 25	1884. Dec. 27
2. Do ....26..	Assyrian Monarch, from London.	" 16	" 7	" 7–30	41.40	" 28	None.

(Indorsed:) 9610. 2532. Supreme court, city and county of New York. J. Rosenthal et al. against William H. Robertson. Complaint and bill of particulars. Hartley & Coleman, plffs' attorneys, 62 Wall street, New York City.

Due service of a copy hereof is hereby acknowledged this 19th day of March, 1885.

ELIHU ROOT,
U. S. Attorney, Att'y for Def't.

8 *Certiorari.*

The President of the United States of America, to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States, for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against William H. Robertson, defendant, by Jesse Rosenthal, & al, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 31st day of March, 1885, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 25th day of March, in the year one thousand eight hundred and eighty-five.

[L. S.] TIMOTHY GRIFFITH, *Clerk*.

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

9 (Indorsed:) 2532. 9610. U. S. circuit court. Jesse Rosenthal, & ano, vs. William H. Robertson. Copy certiorari, Elihue Root, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, March 25, 1885.
Yours,

ELIHU ROOT,
U. S. Attorney, Attorney for Defendant.

To Messrs Hartley & Coleman, plaintiffs' attorney.

10 *Answer.*

Circuit court of the United States for the southern district of New York.

JESSE ROSENTHAL AL.
versus
WILLIAM H. ROBERTSON, COLLECTOR, ETC.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant as collector or otherwise the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

11 V. And further answering, defendant alleges that all moneysr eceived by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs, as and for duties due the United States on imported merchandise and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plantiffs paid over by the defendant in his official capacity aforesaid, to the United States and placed beyond his control.

VI. And further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were sums due from plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

WILLIAM DORSHEIMER,
United States Attorney, Attorney for the Defendant.

(Indorsed:) 2532. 9610. U. S. circuit court, southern district of New York. J. Rosenthal al. vs. W. H. Robertson, collector, etc. Answer. William Dorsheimer, United States attorney, attorney for defendant.

New York, Aug. 28, 1885, plaintiff's attorneys.
To Hartley & Coleman, plaintiff's attorney.

12 *Minutes of trial.*

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Wednesday, the 16th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The honorable Hoyt H. Wheeler, sitting as circuit judge.

JESSE ROSENTHAL ET AL. }
v. } 9610.
WILLIAM H. ROBERTSON. }

Now come the plaintiffs by Hartley & Coleman, esq., their attorneys, and move the trial of this cause; likewise comes the defendant by Samuel B. Clarke, esq., ass't U. S. att'y, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, the jury retire and on their return render a verdict whereby they find for the plaintiffs, subject to adjustment at the custom-house under the direction of the court.

13 It is ordered that a certificate of probable cause be entered herein and that the defendant have a stay of proceedings on said verdict for thirty days.

A copy.

TIM'Y GRIFFITH, *Cl'k.*

14 *Consent to entry of judgment.*

U. S. circuit court, southern district of New York.

J. ROSENTHAL ET AL.
v. } U. S. 9610.
WM. H. ROBERTSON.

On reading and filing the subjoined consent of the attorneys for the respective parties to the above-entitled action, and on motion of Hartley & Coleman, esq., attorneys for the plaintiffs, it is ordered that the clerk of the court enter judgment for the plaintiffs herein for the sum of forty-four $\frac{02}{100}$ dollars, with interest thereon from the 2d day of January, 1886, until the date of such entry, together with the costs as taxed by said clerk.

Dated New York, April 30th, 1886.

ADDISON BROWN.

Form assented to.

STEPHEN A. WALKER,
U. S. Att'y, Att'y for Def't.

15 *Judgment.*

U. S. circuit court, southern district of New York.

J. ROSENTHAL ET AL.
v. } No. 9610.
WM. H. ROBERTSON.

The above-entitled action having been referred to the collector of customs for adjustment of the verdict rendered therein for the plaintiffs December 16th, 1885, and the collector having reported to the U. S. attorney and attorney for the defendant by letter of January 5th, 1886, that the plaintiffs are entitled to receive under said verdict the principal sum of forty $\frac{35}{100}$ dollars, with three $\frac{67}{100}$ dollars interest thereon from the date of payment thereof until January 2d, 1886, amounting in all to
16 the sum of forty-four $\frac{02}{100}$ dollars, it is hereby consented that the clerk of this court enter judgment for the plaintiffs in said action for the sum of forty-four $\frac{02}{100}$ dollars with interest thereon from the 2d day of January, 1886, until such entry, together with the costs as taxed by said clerk.

Dated New York, April 3d, 1886.

HARTLEY & COLEMAN,
Pl'ffs' Att'y.

STEPHEN W. WALKER,
U. S. Att'y and Att'y for Def't.

Therefore it is considered that said plaintiffs do recover against said defendant their damages as above assessed, being forty-four dollars and two cents and interest thereon since January 2, 1886, being 17 eighty-eight cents, and also forty-eight $\frac{35}{100}$ dollars for their costs and charges by the court now here adjudged to them, with their assent, and it is certified that defendant acted in making the exaction complained of under the orders of the Treasury Department and had probable cause so to do.

Judgment signed this 1st day of May, 1886.

JOHN A. SHIELDS,
Deputy Clerk.

Jug't.....	$44.02
Interest..	.88
Costs.....	48.35
	93.25

(Endorsed :) 9610. U. S. circuit court, southern district of New York. J. Rosenthal et al. vs. Wm. H. Robertson. Judgment-roll. Hartley & Coleman, atty's for plffs., 62 Wall st., N. Y. City. U. S. circuit court. Filed May 1st, 1886. Timothy Griffith, clerk.

18 *Defendant's bill of exceptions.*

U. S. circuit court, southern district of New York.

J. ROSENTHAL & AL.
vs. } 9610.
W. H. ROBERTSON.

And be it rem'bered that afterwards, to wit, on the 16th day of December, 1885, this case came on to be tried before the honorable Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, and a jury duly empanelled and sworn to try the issues herein, the action having been brought to recover duty alleged to have been illegally exacted by the defendant as collector of the port of New York upon certain merchandise imported by the plaintiffs.

The parties appeared by their counsel, Messrs. Hartley and Coleman for the plaintiffs, and Sam'l B. Clarke, ass't U. S. atto'ney, for the defendant, and upon the trial the following, among other things, occurred :

19 It was stipulated on the trial that if the plaintiffs should be entitled to recover on the main question raised by their protest that a verdict should be entered generally in plaintiffs' favor, subject to adjustment as to formal requisites and to amount at the custom-house under the direction of the court.

Evidence was given tending to show that on or about July 5th and 7th, 1884, the plaintiffs imported certain iron wire and steel wire hair-pins, upon which the collector of the port of New York assessed a duty of 45 per cent. ad valorem, under that part of Schedule C., sec. 2502 of the Revised Statutes, which reads :

"Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, * * * and whether partly or wholly manufactured, forty-five (45) per centum ad valorem."

The plaintiffs paid the amount of duty assessed, and protested as follows:

20 *Protest.*

NEW YORK, *July* 25, 1884.

SIR: We protest against your decision as to the rate and amount of duties to be paid on the hair-pins entered by us for consumption July 5, 1884, per Donau 86888, from Bremen, because they are dutiable at 30 per cent. ad val. under tariff Schedule E, pins, solid head, or other.

If not so dutiable they are dutiable under said schedule at the rates per pound prescribed for the iron or steel wire of which they are made.

We pay the excess exacted under compulsion solely to get the goods.

J. ROSENTHAL AND CO.,
By HARTLEY AND COLEMAN,
Att'ys, 62 Wall St.

COLLECTOR OF CUSTOMS,
New York City.

And to sustain the issues upon their part, the plaintiffs introduced Leopold Kramer, who testified that he was an importer of fancy goods in the house of plaintiffs, and that their business was the general
21 importation of notions, &c., and who identified the invoices and entries involved in this action; who also showed that the rate of duty upon said hair-pins if classified as "Pins, solid head, or others," would not be less than the rate of duty chargeable upon the iron or steel wire from which they were made.

Witness testified further as follows: These samples are samples of the articles imported, and are known ordinarily as hair-pins. There are also samples of various other kinds of pins: one is a crimping pin, one a solid-head pin, one a pin with a black head called a bonnet pin, used to fasten shawls, also diaper pins. They are made of iron wire and steel wire and have no heads at all. Diaper pins and crimping pins have not solid heads. They have no heads.

Cross-examination by Mr. S. B. CLARKE, assistant United States attorney.

Some pins have heads but are not solid-headed pins. Bonnet pins and shawl pins are pins with heads, but are not solid-headed pins.
22 Those pins [referring to card] are pins with heads, but are not solid-headed pins.

Q. Are solid-headed pins the ordinary pins that everybody has?

Ans. Yes; not everybody. I am familiar with dress pins. I don't know anything about clothes-pins except that there are such things. I know there are linchpins and king-pins for locomotives, but they are not used for the same purpose as the articles in suit.

Plaintiffs rest.

Whereupon defendant's counsel moved the court to direct a verdict for the defendant upon the following grounds, to wit:

1st. That in prior laws pins, solid-head or other, and hair-pins were both provided for, which shews that, as Congress uses the phrase "pins, solid head, or other," it does not include hair-pins.

2nd. That the phrase "pins, solid head, or other," applies only to pins with heads of some kind.

3rd. Generally; that the evidence does not make out a case for recovery by the plaintiffs.

Which motion the court denied; to which ruling of the court's defendant's counsel then and there excepted.

23 The court thereupon charged the jury as follows:

Gentlemen, if you think these articles are pins, according to the common understanding of the class of pins that are known as solid-head pins, or other pins, return a verdict for the plaintiffs; if not, return a verdict for the defendant. You may take the case.

The jury having retired for consultation return a verdict for the plaintiffs.

And because the matters aforesaid do not appear by the record of this case, the court has granted and allowed this bill of exceptions, and has signed the same as of December 16, 1885.

HOYT H. WHEELER.

24 (Indorsed:) 9610. U. S. circuit court, southern dist. of N. Y. J. Rosenthal et al. versus W. H. Robertson. Defendant's bill of exceptions. Stephen A. Walker, United States att'y, att'y for defendant. U. S. circuit court. Filed March 25, 1886. Timothy Griffith, clerk.

25 *Assignment of errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, PLAINTIFF IN ERROR,
vs.
JESSE ROSENTHAL & SAMUEL ROSENTHAL, defendants in error.

Afterwards, to wit, on the second Monday of October in the same term, before the justices of the said court at the Capitol in Washington, comes the said plaintiff in error by Stephen A. Walker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, etc.

STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

(Indorsed:) 9610. United States Supreme Court. William H. Robertson, plaintiff in error, vs. Jesse Rosenthal & ano., defendants in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within assignment of errors is hereby admitted this 14th day of May, 1886.

HARTLEY & COLEMAN,
Att'y for Defendants in Error.

U. S. circuit court. Filed May 14, 1886. Timothy Griffith, clerk.

27 UNITED STATES OF AMERICA, *ss:*

To Jesse Rosenthal and Samuel Rosenthal, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated, May 14, 1886.

ADDISON BROWN.

28 (Indorsed:) 9610. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Jesse Rosenthal & ano. defendants in error. Citation. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within citation is hereby admitted this 14 day of May, 1886.

HARTLEY & COLEMAN,
Attorneys for Defendants in Error.

(Indorsement on cover:) No. 320. William H. Robertson, collector of the port of New York, plaintiff in error, vs. Jesse Rosenthal and Samuel Rosenthal. S. New York, C. C. U. S. Filed August 19, 1886.

Office Supreme Court U. S.
FILED.
OCT 23 1889
JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, collector of the port of New York, plaintiff in error,
vs.
JESSE ROSENTHAL AND SAMUEL Rosenthal.
No. 57.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

October Term, 1889.

William H. Robertson, collector of the port of New York, plaintiff in error. *vs.* Jesse Rosenthal and Samuel Rosenthal.	No. 57.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was brought to recover an alleged excess of duties exacted by the collector at the port of New York.

Plaintiffs below imported goods described as "pins and hair-pins" (pp. 2, 3).

The goods were classified under the last paragraph of Schedule C, act of March 3, 1883 (22 Stat., 501; T. I., 216), and a duty of 45 per centum ad valorem was exacted by the collector.

This paragraph reads:

> *Manufactures, articles,* or wares, not specially enumerated or provided for in this act, *composed wholly or in part of iron, steel,* * * * *or any other metal,* and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers claimed they ought to pay only 30 per cent. ad valorem, either under Schedule C, which reads, "Pins, solid head, or other, thirty per centum ad valorem" (22 Stat., 501; T. I., 209); or, under the paragraph in the same Schedule, "at the rates per pound prescribed for the iron or steel wire of which they are made." (See protest, p. 8.)

The only question the trial judge left to the jury was, whether "these articles are pins according to the common understanding of the class of pins that are known as solid-head pins, or other pins" (p. 9; m. p. 23).

The jury found for plaintiff on this issue.

SPECIFICATION OF ERROR.

The court erred in not directing a verdict for defendant as requested (see bottom of p. 8 and top of p. 9), upon the grounds:

> First. That in prior laws, pins, solid-head or other, and hair-pins were both provided for, which shows that, as Congress uses the phrase, "pins, solid-head or other," it does not include hair-pins.

Second. That the phrase "pins, solid-head or other," applies only to pins with heads of some kind.

Third. Generally, that the evidence does not make out a case for recovery by the plaintiffs.

The court denied the motion and defendant excepted.

BRIEF OF ARGUMENT.

I.

The articles imported were *hair-pins.*

The importers only witness refers to them as "*said* hair-pins" (p. 8; m. p. 21), and further testifies they "are *ordinarily known* as *hair-pins*" (p. 8; m. p. 21).

This evidence is absolutely *uncontradicted.*

There is no question of fact, therefore, over whether the articles imported were hair-pins or not. The court below *was bound* to accept the fact that they were *hair-pins*—just that and nothing else.

II.

Hair-pins are *not* "specially enumerated or provided for" in the paragraph reading, "Pins, solid-head or other," etc., and as a matter of *law* defendants' *Third* request should have been granted.

By reference to the tariff act preceding this (Rev. Stats., 480; T. I., 465, old) we find in "Schedule M, Sundries," the identical designation above, word for word, even to the rate of duty, viz: "Pins, solid-head or other, thirty-five per centum ad valorem." But preceding, in the same "Schedule M, Sundries" (Rev. Stats., 476; T. I., 378, old), we find "Hair-pins, made of iron wire, fifty per centum ad valorem."

By the act of March 3, 1883, "Pins," etc., were taken out of the schedule of "Sundries," where they had been, and brought forward and placed in the schedule of "Metals" (22 Stats., 501), using the *identical* language used in the prior act as to pins," etc. The words, "Hair-pins made of iron wire, etc.," were omitted in the act of 1883, and a general clause was added (see last paragraph, Schedule C), which distinctly and exactly covers them in its description.

It is plain from the above, that *down to the tariff act of* 1883 the words "Pins, solid-head or other," did not cover "hair-pins."

What right have we to assume, then, that Congress, in 1883, meant by the words "Pins, solid-head or other," etc., *any more* than it had previously meant by the same words?

It is submitted whether the language of Mr. Justice Davis in *Reiche* v. *Smythe*, 13 Wall., 162, 164, may not be applicable. He says that—

> It is fair to presume, in case a special meaning were attached to certain words in a prior tariff act, that Congress intended they should have *the same signification* when used in a subsequent act in relation to the same subject matter.

And see opinion by Nelson, J., in *De Forest et al.* v. *Lawrence* (13 How., 274, 282), where he says:

> When Congress, however, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue pur-

> poses, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known, in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practiced on at the custom-house.

The evidence shows that there are "various other kinds of pins," some *without* heads, some with *solid heads,* and some with *heads* that are *not solid.* There appear to be also crimping-pins, bonnet-pins, diaper-pins, shawl-pins, dress-pins, and *clothes*-pins. Of all these, hair-pins alone were singled out by a prior Congress and given a separate place, and burdened with a separate and *higher* duty than the others.

Inasmuch, therefore, as Congress had previously used the words, "Pins, solid head or other," etc., in such way as to show it did *not thereby* intend to include "hair-pins," it is fair to presume, that when another Congress in the act of 1883, used the same words, *it* did not intend to include hair-pins; and if it did not, the collector was right.

O. W. Chapman,
Solicitor-General.

Office Supreme Court U. S.
FILED.
OCT 28 1889
JAMES H. McKENNEY
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1889, NO. 57.

WILLIAM H. ROBERTSON,
Plaintiff in Error,

vs.

JESSE ROSENTHAL ET AL.,
Defendants in Error.

Brief for Defendants in Error.

The only exception taken was to the *refusal of the Court to direct a verdict* for defendant at the close of plaintiff's case (Record, fol. 22). Defendants' motion for such direction was equivalent to a demurrer to evidence. The record fails to show that all the evidence is brought up by the bill of exceptions (Record, fol. 18, end), but enough appears to show that under the stipulation at the trial (Record, fol. 19) the only question was whether hair-pins made of *iron* wire and *others* of *steel* wire were dutiable under the Tariff Act of March 3, 1883, as "pins" or as non-enumerated manufactures of iron and steel.

The motion to direct a verdict for defendant was based on three grounds (Record, fol. 22):

"1st. That in prior laws pins, solid-head or other, "and hair-pins were both provided for, which shows

" that as Congress uses the phrase 'pins solid-head or " other,' it does not include hair-pins.

" 2d. That the phrase 'pins, ~~solid,~~ solid-head or " other,' applies only to pins with heads of some kind.

" 3d. Generally that the evidence does not make out " a case for recovery by the plaintiffs."

The first ground is untrue as stated. There never was any revenue statute imposing a duty on *hair-pins generally:* Hair-pins made of *iron wire* were provided for, as we shall show, but the hair-pins of *steel wire* in this case (Record, fol. 19) have never been dutiable as hair-pins under any statute.

Hence, the Court could not on the first ground direct a general verdict for defendant, as asked.

Elliot vs. Piersol, 1 Peters, 338, top.
Harvey vs. Tyler, 2 Wallace, 338.
Beaver vs. Taylor, 93 U. S.. 54.

By Section 13, Act July 14, 1862 (12 Stats., p. 557, middle) provision is made for " Pins, solid-head or other." *In the same section, same page,* top, " Manufactures, articles, vessels and wares, not otherwise provided for, of * * * iron, steel * * * or other metal * * * or of which either of these metals or any other metal shall be the component material of chief value," are also enumerated. The rate of duty imposed upon each of these enumerations is the same, viz., 5%.

By Section 21, Act July 14, 1870 (16 Stats., p. 264), appears for the first time " On hair-pins made of iron wire 50%."

Title 33, Sched. M, Sundries, Rev. Stats. of 1874, consolidating prior statutes, has:

Hair-pins made of iron wire 50%.
Pins, solid-head or others, 35%

Sched. E, Metals:

Manufactures, articles, vessels and wares, not otherwise provided for, of iron * * * or other metals, &c., 35%.

The Act of March 3, 1883 (22 Stats., p. 489), enacts: Sec. 6. That on and after the first day of July, 1883, the following sections shall constitute and be a substitute for Title 33, of the Revised Statutes of the United States. * * * Schedule C, p. 501: "Pins, solid-head or other, 30% *ad valorem*," and at the end of the schedule:

"Manufactures, articles and wares not specially enumerated or provided for in this act composed wholly or in part of iron * * * or any other metal, &c., 45% *ad val.*"

Under the Internal Revenue Acts the enumerations were as follows:

Act of 1862, 12 Stats., 464, Pins, solid-head or other.
" " 1864, 13 " 266, " " " " "
" " 1866, 14 " 130, " " " " "

With no separate mention of hairpins in either of said acts.

The most that can be claimed for this legislation by the Government is, that from 1870 to 1883 Congress saw fit to impose temporarily upon hair-pins made of *iron wire* a duty of 50%, and when simplification was desired by the Act of 1883 that provision was dropped and hair-pins of *iron wire*, like hair-pins of steel wire, fell under the statutory provision that most aptly described them, viz., pins.

Of De Forest vs. Lawrence, 13 How., 274–282, we remark:

The import was dried sheepskins with the wool on. Commercially known as "sheepskins." It never had been dutiable as "skins," but always with a specific duty as "*wool on the skin*," and in the same acts, dried skins, hides, &c., had been separately dutiable *eo nomine*. The Act of 1846 omitted to provide for "wool on the skins," but did provide for "dried skins, raw hides, &c." These the Court held were and had always been for tanning purposes and had never included wool on the skins nor did they in the Act of 1846.

The commercial designation of sheepskins failed to bring them into this descriptive clause of tanner's stock because their use was not for tanner's stock.

Moreover, they had always been treated in the statute as a species of wool and not as skins.

This case has nothing to do with the one at bar, where pins generally for a long period of time had been provided for at one rate of duty, and for a short time only, a part of a single variety had a special rate imposed on it, and on the repeal of this special rate and the re-enactment of the general clause, the part of the special variety fell into the original class from which it was drawn.

Reiche vs. Smythe has no application here.

In that case, by the Act of 1861, there were exempted from duty in a single phrase: "Animals living, of all kinds, birds, singing, and other, and land and water fowls." The conclusion here was irresistible, that animals, birds and fowls were regarded by the Legislature in the popular sense as distinct things, each requiring to be exempted by its own name, else why separate mention of each for *the same purpose.*

The language of the decision is carefully guarded. Here Congress has provided for pins comprehensively, and put a duty on them of 35 % by name, and yet saw fit for a while to put a special duty of 50 % on iron wire hairpins, which they could only do by mentioning them by name, not because they were anything else than pins, but simply on that particular pin they wanted to put a duty of 50 % instead of 35 %.

These pins are *ejusdeus generis* with other toilet pins, and the case of Reiche vs. Smythe is not in point.

The theory of statutory construction put forth ~~to~~ by the learned Solicitor-General cuts two ways.

The Act of 1870 differed, "hairpins made of iron wire," from "non-enumerated manufactures of metals," just as much as from "other pins," both of which were then existing tariff descriptions of dutiable articles.

And if, because of this temporary special provision for iron wire hair-pins, they could never after fall back into the category of pins, neither could they lapse into non-enumerated manufactures of metals.

The true construction is, that being pins, they were under the Act of 1883, where no mention is made of iron wire hair-pins, among the "*other pins*" provided for in that act, and being so enumerated, they were not non-enumerated manufactures of metal.

That they are pins, the jury have here found them to be, and the provision for pins is more specific than that for non-enumerated manufactures of metal.

As for the second ground of defendant's motion, the clause in the law might just as well read, "solid-head or other pins."

The only noun in the clause, "pins" is divided into two classes, pins which have solid heads, and "other" *pins*.

The popular general meaning of the word pins is inclusive of hairpins.

Both, Webster's and Worcester's Dictionaries unite in the definition :

"Hair-pin, a pin used for dressing the hair."

We are to assume that the terms of the tariff are used in their general and popular meaning by commercial men, until evidence shows to the contrary.

Swan vs. Arthur, 103 U. S., 598.

Whether there was any evidence offered of commercial designation, the record fails to show.

The third ground of defendant's motion is no broader than the two above considered, as it sufficiently appears by the stipulation (Record, fol. 19), and the defendants consent to judgment (Record, fols. 15 and 16), that the only question at the trial was, whether a hairpin is under the tariff, a pin of any kind.

The reason of the matter is with us. Toilet pins are all for the same general purposes, although embracing a great variety of patterns, of different materials and of different names.

Why should they not, for simplicity of administration and public convenience be all classified together ?

Heads are simply contrivances to take hold of when inserting or withdrawing the pin and to keep it in place. The bridge or nose of a hair-pin performs these offices.

The supposed *distinctions* in *rates of duty* between pins with hollow heads, solid heads, heads made by bending the wire, or no heads at all, is not founded on the language of the statute nor any evidence in the case, nor on reason.

It is only a tax gatherer's subtlety.

There was no error in submitting the case to the jury. Samples of the goods imported and of pins generally were in evidence (Record, folio 21).

Whether the meaning of the statute be for the Court alone to determine or for the jury to find under the instructions of the Court, the application of the statute to the *goods in dispute* was a question of fact for the jury.

Richardson vs. City of Boston, 19 How., 270, middle.

There was a disputed question of fact whether the imports were " other pins " and it was the duty of the Court to submit the evidence to the jury.

Barney vs. Schmeider, 9 Wallace, 248–252.

If different minds acting on the same state of facts could draw different conclusions from them, the Court must submit the case to the jury.

R. R. Co. vs. Stout, 17 Wall., 663-664.

The charge presented the precise point in dispute and there was no exception to it. Judgment should be affirmed.

Edward Hartley,
Walter H. Coleman,
Counsel for Defendant in error.

132-464

132-464

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1260.

JAMES C. PENNIE, ADMINISTRATOR OF THE ESTATE OF EDWARD A. WARD, DECEASED, PLAINTIFF IN ERROR,

vs.

C. REIS, TREASURER OF THE POLICE LIFE AND HEALTH INSURANCE FUND OF THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 30, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1260.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 14, 1889.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said supreme court, before you, between James C. Pennie, administrator of the estate of Edward A. Ward, deceased, *vs.* The Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco in the decision on the validity of a statute of the State of California on the ground of the repugnancy of said statute to the Constitution of the United States, and your decision is in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said James C. Pennie, administrator, &c., as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of November next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

[SEAL.] Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice, Supreme Court of California.

2 Indorsed: United States supreme court. James C. Pennie, administrator of the estate of Edward A. Ward, deceased, plaintiff in error, *vs.* The Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco, defendant in error. Writ of error. Filed Sept. 12th, 1889. J. D. Spencer, clerk, by J. J. Paulsell, deputy.

Schedule.

1. Writ of error.
2. Answer.
3. Citation.
4. Bond.
5. Petition for mandate.
6. Demurrer.

7. Minutes of court.
8. Opinion of court.
9. Assignment of errors and prayer for reversal.
10. Certificate of clerk.

3 *The Answer of the Judges of the Supreme Court of the State of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, contained in a certain schedule to this writ annexed, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within, as within we are commanded.

Witness the Hon. W. H. Beatty, chief justice of the supreme court of the State of California, this 23 day of September, 1889.

[Seal Supreme Court of California.]

Attest: J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy*.

4 UNITED STATES OF AMERICA, *ss:*

To C. Reis, treasurer of the police life and health insurance fund of the city and county of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 11th day of November, A. D. 1889, pursuant to a writ of error allowed in the cause lately pending in the supreme court of the State of California, in which James C. Pennie, administrator of the estate of Edward A. Ward, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 6th day of September, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.]

W. H. BEATTY,
Chief Justice.

5 Indorsed: No. 13198. In the Supreme Court of the United States. James C. Pennie, administrator of the estate of Edward A. Ward, deceased, plaintiff in error, *vs.* The Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco, defendant in error. Citation. Received a copy of the within citation this 6th day of September, 1889. Davis Louderback, attorney for C. Reis, treasurer, &c. C. Reis. Witness, Jennie Laird. Filed Sept. 12th, 1889. J. D. Spencer, clerk, by J. J. Paulsell, deputy.

6 Know all men by these presents that we, Alfred Clarke, at 636 Clay street, and A. Clarke, Jr., at 1713 Broderick street, San Francisco, are held and firmly bound unto C. Reis, treasurer of

the police life and health insurance fund of the city and county of San Francisco, in the sum of two hundred dollars, lawful money of the United States of America, to be paid to the said C. Reis, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind our heirs, executors, and administrators firmly by these presents.

Signed, sealed, and dated the 10th day of September, one thousand eight hundred and eighty-nine.

The condition of the above obligation is such that James C. Pennie, administrator of the estate of Edward A. Ward, deceased, hath prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment of the supreme court of California in a certain proceeding, No. 13198, wherein said James C. Pennie, administrator, &c., was petitioner and said C. Reis, treasurer, &c., was respondent:

Now, therefore, the condition of this obligation is such that if the above-named James C. Pennie, administrator, &c., shall duly prosecute said writ of error with effect and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decision shall be affirmed, then the above obligation to be void; otherwise to remain in full force and virtue.

ALFRED CLARKE. [SEAL.]
A. CLARKE, Jr. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

7 STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Alfred Clarke and A. Clarke, Jr., the within named, being duly sworn, each for himself deposes and says that he is a resident of the city and county of San Francisco, in the State of California, and is worth the sum of two hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

ALFRED CLARKE.
A. CLARKE, Jr.

Subscribed and sworn to before me this 10th day of September, 1889.

JNO. J. KENNY,
Clerk of the Police Court.

8 Indorsed: In the Supreme Court of the United States. James C. Pennie, administrator, &c., plaintiff in error, *vs.* The Treasurer, &c., defendant in error. Bond on writ of error. Dated Sept. 10th, 1889. The form of the within bond and the sufficiency of the sureties thereon are hereby approved Sept. 10th, 1889. W. H. Beatty, chief justice supreme court of California. Filed Sept. 12th, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

9 In the Supreme Court, State of California.

JAMES C. PENNIE, Administrator of the Estate of Edward A. Ward, Deceased,
vs.
THE TREASURER OF THE POLICE LIFE AND HEALTH INSURANCE FUND OF THE CITY AND COUNTY OF SAN FRANCISCO.

Petition for Writ of Mandate.

To the honorable supreme court, State of California:

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Comes your orator, James C. Pennie, who, being duly sworn, deposes and says that Edward A. Ward was appointed a police officer of the city and county of San Francisco on the 24th day of September, 1869.

10 That said Ward immediately thereafter duly qualified as such police officer and entered on the discharge of his duties as such police officer, and said Ward continued to hold and occupy said office and to discharge the duties thereof until his death, which occurred at said city and county on the 13th day of March, 1889.

That said Ward was a police officer of said city and county and a member of the police force of said city and county at the time of his death.

That said Ward contributed out of his salary as such police officer the sum of $2.00 per month, for each and every month from the 1st day of April, 1878, to and including the month of March, 1889, to the police life and health insurance fund of said city and county, and the total amount of said Ward's contribution to said fund was and is $264.00.

11 That upon the death of said Ward as aforesaid, it was and is the duty of the treasurer of the police life and health insurance fund to pay to the legal representative of said Ward the sum of $1,000.00.

That on the 5th day of April, 1889, your orator was duly appointed administrator of the estate of said Ward by the superior court of the city and county of San Francisco, State of California.

That on the 5th day of April, 1889, your orator duly qualified as administrator of said estate and letters of administration were issued to him, a copy of which letters are hereto annexed and made a part hereof, and such letters have not been revoked and are still in force.

That upon the appointment of your orator as such administrator there was due to him as the legal representative of said 12 Ward the sum of $1,000.00, payable out of said fund by the treasurer thereof.

That on the 5th day of April, 1889, your orator demanded payment of said insurance from the Honorable C. Reis, the treasurer of said fund, and to pay the same said treasurer refused and still refuses.

That at the time of making said demand there was in said fund the sum of $40,000.00 applicable to pay said claim of your orator.

That by reason of the refusal of said treasurer to pay the said just claim of your orator your orator has suffered damages in the sum of $100.00.

That your orator is the party beneficially interested in this proceeding, and that he has no plain, speedy, and adequate redress in
the ordinary course of law.

13 That at all the times hereinbefore stated the Honorable
C. Reis was and is the treasurer of said fund, and said defendant has had and still has in his possession ample funds applicable to pay the said just claim of your orator hereinbefore stated.

Your orator charges that the respondent does not refuse to pay said claim of petitioner for want of funds to pay the same, nor does the respondent deny that said Ward was a police officer at the time of his death, as stated in this petition.

Nor does respondent deny that said Ward was a contributor to said fund and insured therein as aforesaid.

But said respondent refuses to pay this claim of petitioner for the
reason that respondent claims that section 13 of an act to
14 create a police relief and pension fund in the several counties,
cities and counties, cities and towns, of the State, approved
March 4th, 1889, excuses him from paying said claim.

Your orator respectfully shows that said section of said act is a violation of section 1 of article XIV of the Constitution of the United States; and is also a violation of section 13 of article 1 of the constitution of California, in so far as said section thirteen of said act of March 4th, 1889, seems to forbid the payment of this just claim of your orator.

And this petitioner says that he applies for a writ of mandate first to this honorable court instead of to the superior court, because the decision in this petition involves the constitutionality of the police pension act, chapter 62 of statutes, 1889, approved March
4th, 1889, because petitioner has been requested by the presi-
15 dent of the board of police commissioners and the chief of
police of the city and county to press for a speedy and an
authoritative decision of this court of final resort.

JOSEPH NAPHTALY,
Att'y for Petitioner.

ALFRED CLARKE, *Of Counsel.*

16 *Letters of Administration.*

In the Superior Court in and for the City and County of San Francisco, State of California. Department No. 9, Probate.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

James C. Pennie, public administrator, is hereby appointed administrator of the estate of Edward A. Ward, deceased.

Witness Wm. A. Davies, clerk of the superior court in and for the city and county of San Francisco, with the seal of said court affixed this 5th day of April, 1889.

By order of the court:

[SEAL.] WM. A. DAVIES, *Clerk*,
By F. B. HOUGHTON,
Deputy Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco. }

17 I do solemnly swear that I will support the Constitution of the United States and the constitution of the State of California, and that I will faithfully discharge the duties of administrator of the estate of Edward A. Ward, deceased, according to law.

JAMES C. PENNIE.

Subscribed and sworn to before me this 5th day of April, 1889.

F. B. HOUGHTON,
Deputy County Clerk of the City and County of San Francisco.

Indorsed: No. 8325. In the superior court in and for the city and county of San Francisco, State of California. Department No. 9, probate. In the matter of the estate of Edward A. Ward, deceased. Letters of administration. Issued April 5th, 1889, to James C. Pennie, administrator. Duplicate filed April 5th, 1889. Wm. A. Davies, clerk, by F. B. Houghton, deputy clerk.

18 STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

James C. Pennie, being duly sworn, deposes and says that he is the petitioner in the above-entitled action; that he has read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JAMES C. PENNIE.

Subscribed and sworn to before me this 8th day of April, 1889.

[SEAL.] GEO. T. KNOX,
Notary Public.

19 Indorsed: No. 13198. Supreme court, State of California. James C. Pennie, adm'r of the estate of Edward A. Ward, deceased, plaintiff, *vs.* The Treasurer of the Police Life and Health Insurance Fund. Petition for writ of mandate. Filed April 15th, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy clerk.

20 In the Supreme Court of the State of California.

JAMES C. PENNIE, Administrator of the Estate of Edward A. Ward, Deceased,
vs.
THE TREASURER, &c. }

Now comes C. Reis, the treasurer of the city and county of San

Francisco, State of California, and the party upon whom was served, on the 15th day of April, 1889, in said city and county of San Francisco, the alternative mandamus issued herein, together with a copy of the petition or affidavit herein attached to said mandamus, and demurs to the petition or affidavit herein, and for grounds and causes of demurrer states:

21 1.

That the said petition or affidavit does not state facts sufficient to constitute a cause of action or to entitle the petitioner herein to any writ of mandate or any relief whatever.

2.

That the said act of the Legislature of the State of California, entitled "An act to create a police relief health and life insurance and pension fund in the several counties cities and counties cities and towns, of the State, passed March 4th, 1889," is a valid and constitutional enactment, and the petitioner is not entitled to any writ of mandate or relief herein.

Wherefore respondent prays to be hence dismissed.

DAVIS LOUDERBACK,
Attorney for Respondent.

Geo. Flournoy, Jr., city and county attorney of city and county of San Francisco.

22 Indorsed: No. 13198. In the supreme court of the State of California. James C. Pennie, administrator of the estate of Edward A. Ward, deceased, *vs.* The Treasurer, &c. Demurrer. Service of the within and a receipt of a copy thereof is hereby admitted this —. Filed April 25th, 1889. J. D. Spencer, clerk, by J. J. Paulsell, deputy clerk.

23 *Extracts from the Minutes of the Supreme Court of the State of California.*

JAMES C. PENNIE, Administrator of the Estate of Edward A. Ward, Deceased, Petitioner,
vs.
THE TREASURER OF THE POLICE LIFE AND HEALTH INSURANCE FUND, Respondent.

Joseph Naphtaly, attorney for petitioner.
Alfred Clarke, of counsel.

April 26th, 1889.—Cause argued. Petitioner allowed ten days to file brief, respondent ten days to answer, petitioner ten days to reply, cause to be then submitted.

May 6th, 1889.—Filed brief of Alfred Clarke for petitioner.

May 16th, 1889.—Filed brief for respondent.

May 27th, 1889.—Reply brief of petitioner and submitted.

June 13th, 1889.—Filed supplemental brief for petitioner.

24 Sept. 2nd, 1889.—The prayer of the petitioner is denied and the writ dismissed.

McFARLAND, *J.*

We concur.
WORKS, *J.*
THORNTON, *J.*
PATTERSON, *J.*

25 *In Bank.* (*Filed Sept.* 2, 1889.)

PENNIE, Administrator, Petitioner,
vs.
THE TREASURER, etc., Respondent.
No. 13198.

This is a petition for a writ of mandate to compel the treasurer of the police life and health insurance fund of the city and county of San Francisco to pay petitioner, as administrator of Edward A. Ward, deceased, the sum of one thousand dollars.

On April 1, 1878, an act of the Legislature was approved in relation to the police force of the city and county of San Francisco. It provided (section 2), among other things, that the compensation of police officers "shall not exceed" $102 per month, and that the treasurer "shall retain from the pay of each police officer the sum of $2 per month, to be paid into a fund to be known as 'The police life and health insurance fund,' which shall be administered as is provided in sections 9 to 13, inclusive, of this act." These last-named sections provide generally that the mayor, auditor, and treasurer of the city and county shall constitute "the police life and health insurance board;" that such board shall invest the moneys of the fund in certain securities, and that upon the death of a member of the police force there shall be paid to his legal representatives by said treasurer the sum of one thousand dollars.

The said deceased, Edward A. Ward, was a member of said police force at and before the time of the passage of said act of April 1, 1878, and continued to be a member of said force until the time of his death, which occurred March 13, 1889.

But before his death there went into effect an act of the Legislature, approved March 4, 1889, entitled "An act to create a police relief health and life insurance and pension fund in the several counties, cities and counties, cities and towns, of the State." This act is very comprehensive and has many details. It provides generally for a police relief and pension fund and for a board to manage it, for pensions to persons over sixty years old who have been in the service for a certain period and to those who become disabled in the performance of their duties and to the widows or children of those who lose their lives in the performance of such duties, for the payment of a certain sum of money to the widows or children of those who die from natural causes after they have served ten years, and for other benefits to members of the police force, not necessary to be here mentioned. Section 13 of the act provides that "any police life and health insurance fund or any fund provided by law heretofore existing in any county, city and county, city or town, for the relief or pensioning of police officers or their life or health insurance or for the payment of a sum of money on their death shall be merged with, paid into, and constitute a part of the fund created under the provisions of this act." Section 15 provides that "all acts or parts of acts in conflict with the provisions of this act are hereby repealed." Under this act the respondent refuses to pay the money demanded by the administrator of the said Ward, deceased.

The petitioner makes numerous attacks on the validity of said last-named act and upon its efficiency to accomplish the purpose for which it was evidently intended. We will notice a few of them.

26 I. The main contention of petitioner is that the act is in violation of the provisions of the Constitutions of the United States and of this State that no person shall be deprived of property without due process of law. This contention goes upon the theory that the deceased had a vested property right in the thousand dollars of public money which the statute had at one time directed to be paid to his legal representative upon the happening of the contingency of his death. Had he died while the law still directed such payment a different question would have been presented. He had a mere expectancy which could have none of the elements of a vested right until the contingency contemplated by the statute had happened; but when that event came there was no statute which gave it any significance. A public officer, at least one whose term and compensation are not prescribed by the Constitution, has no contract by which he can have or hold either his office or his salary against the legislative will. In Miller *vs.* Kister (68 Cal., 144) this court say: "But it is well settled that salaried public offices created by the Legislature are not held by contract or grant. The Legislature has full control over them, unless restricted by the Constitution, and may abolish them altogether or impose upon them new duties or reduce their salaries;" and such an officer "accepts the office with the direct understanding that during his term of office the Legislature may modify or amend the acts concerning fees of office without impairing any legal right acquired by him by virtue of his election and entry upon the duties of his office." (Miner *vs.* Solano Co., 26 Cal., 118; see also Attorney General *vs.* Squires, 14 Cal., 13; People *vs.* Haskell, 5 Cal., 357.) The said act of March 4, 1889, therefore did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner.

II. It is contended that the said act last named did not repeal the provision of said act of April 1, 1878, under which petitioner claims. It is true that it does not expressly refer to that part of the former act and repeal it in terms, but it repeals it by necessary implication. "The latter takes place whenever by subsequent legislation it becomes apparent that the Legislature did not intend the former act to remain in force." (Christy *vs.* B. S., Sacramento Co., 39 Cal., 1.) And it is apparent that the Legislature, when passing the act of 1889, did not intend the act of 1878, so far at least as said provision is concerned, to remain in force. The two acts, with respect to the matter before us, are utterly inconsistent and cannot both stand. The provision of section 24 of article IV of the State constitution, about revising or amending a law by reference to its title, applies clearly to acts which are in terms revisory or amendatory of some former act; it does not apply to an independent act. When two independent acts are incurably inconsistent and contradictory there is only one rule to follow, and that is to give effect to the latest expression of the legislative will.

The two foregoing points are the main ones presented by petitioner, but his counsel makes one or two other points in his brief, and suggests or intimates a number of others which we have no time to notice here in detail. We will content ourselves with saying that, in our opinion, the title of the said act of March 4, 1889, is sufficient; that it does not create a "special commission" within the prohibition of sec. 13 of art. XI of the State constitution; that it is not violative of the prohibitions in the constitution of granting an "extra compensation," etc., to any public officer or increasing such compensation or making any gift of public money, and that, so far at least as those parts of said act which affect the rights of petitioner are involved, we see no legal objection to the validity and efficiency of said act.

The prayer of the petitioner is denied and the writ dismissed.

McFARLAND, *J.*

We concur:
WORKS, *J.*
THORNTON, *J.*
PATERSON, *J.*

27 In the Supreme Court of the United States.

PENNIE, &c., Plaintiff in Error,
vs.
TREASURER, &c., Defendant in Error.

Assignment of Error and Prayer for Reversal.

To the honorable the Supreme Court of the United States:

The plaintiff in error specifies the errors of which he complains as follows:

The supreme court of California erred—

One.

In holding, "This contention goes upon the theory that the deceased had a vested property right in the thousand dollars
28 of public money which the statute had at one time directed to be paid to his legal representative upon the happening of the contingency of his death."

There is a double error in this statement.

1st. The petitioner did not so contend.

2nd. This insurance fund is not public money.

First. The issues in our case must be determined by the pleadings.

Our petition being met by respondent's demurrer must be taken to be true.

The petition alleges that "Ward contributed out of his salary as a
police officer the sum of $2.00 per month for each and every
29 month from April 1st, 1878, to and including the month of
March, 1889, to the police life and health insurance fund, and
the amount of said Ward's contribution to said fund was and is
$264.00."

"That Ward died on March 13th, 1889, and was a police officer and a member of the police force of said city and county at the time of his death.

That petitioner is the legal representative of said Ward.

That there is due to petitioner as the legal representative of said Ward the sum of $1,000, payable out of said fund, by respondent.

That it was and is the duty of respondent to pay said sum of $1,000.00.

That payment of said sum of $1,000.00 was demanded
30 by petitioner and refused by respondent.

That respondent refused to pay said claim on the ground that § 13 of the act of March 4th, 1889, p. 59, excuses him from paying said claim.

That at the time of said demand respondent had $40,000 in his possession applicable to pay this just claim of petitioner.

These allegations are admitted by respondent to be true."

The petitioner claims that on the above-admitted facts Ward had, on the 3rd of March, 1889, a vested right in an insurance on his life by a solvent insurer for the sum of $1,000.00, payable on his death.

The rights of the insurer and the insured are reciprocal
31 and are declared and defined by many statutes and decis-
ions, and among the rights which Ward possessed on March
3rd, 1889, was the right to "resign from the police force for bad
health or bodily infirmity," in which case the statute provided
"there shall be paid to him from said fund the amount of the prin-
cipal sum which he had contribnted thereto."

This right to resign was vested and the right to be paid the $264.00 would not vest until the resignation had been offered.

Ward had the further right to be paid from said fund a portion
"of his contribution to said fund" in case of dismissal from office
for incompetency, and if dismissed for crime his forfeiture would
be adjudged by the judicial power as held in Jeck *v.* Anderson, 57
Cal., 251.

32 Ward had also a vested right on March 3rd, 1889, to the
surrender value of his insurance, as defined in §§ 451–'2 of the
Civil Code, passed April 1st, 1878; pp. 82–'3 of amendments to
Codes, 1878.

despoiled by an act of the Legislature, which act, being violative of the 14th article of the United States Constitution, cannot be held to be due process of law, said discrimination being class legislation, operating in favor of scme and discriminating against others in like circumstances, and thereby invading the substantial right "of Ward and persons in the same class" to an insurance on his life which has an instant and present valuation," as held by this court in Carr *v.* Hamilton, 9 U. S. S. C. R., 296.

This discrimination against Ward and those in his class
41 in favor of the pensioners and those in their class all being in the same business "is forbidden by the 14th article," as construed by this court in Scon Hing *vs.* Crowley, 113 U. S. R., 703, "and is discriminating legislation in an invidious sense."

The police power of the State "affords no warrant for such an exercise of the legislative power as should subvert our right" to our insurance already paid for to the date of our death.

"This discrimination is illegal and is a denial of the equal protection of the laws, and violates the 14th article United States Constitution."

Because this court has held that "the insured has an equitable right to have the amount of his premiums restored to him." * * * "He is fairly entitled to have the equitable value of his
42 policy." N. Y. *v.* Stratham, 103 U. S. R., 34.

The pension bill having made no provision for the cancellation of Ward's insurance, said Ward remained an insured person, and upon his death the right to his insurance vested in his legal representative.

Five.

In overlooking the provision of § XI of the police insurance law of April 1st, 1878, Statutes, 1878, p. 882, that "in case any police officer shall resign from bad health or bodily infirmity there shall be paid to him from said fund the amount of the principal sum which he shall have contributed thereto."

Six.

In holding that the Legislature could appropriate the $264.00 of salary already earned by Ward and contributed by him to the police life and health insurance fund as premiums on the insur-
43 ance of $1,000.00 on his life.

Seven.

In overlooking the provision of the non-forfeiture, life insurance law passed April 1st, 1878, as § 452 of the Civil Code of California.

(Amendments to Codes 1878, p. 83.)

Eight.

In holding that Ward was not insured at the time of his death.

Nine.

In applying the doctrine of Miller *v.* Kister, 68 Cal., 144; Miner *v.* Solano, 26 Cal., 118; Att'y Gen. *v.* Squires, 14 Cal., 13; Peop. *v.* Haskell, 5 Cal., 357, to our case, as we are not seeking to hold office or salary against the legislative will.

Ten.

In applying to our case the plenary power of the Legislature over officers of its creation, which power is prospective as to duties and salaries and is not retrospective so as to affect a forfeiture of
44 a salary already earned or a life insurance fully paid for.

Eleven.

In holding that "the act of March 4th, 1889, did not interfere with any vested right and is not obnoxious to the constitutional principle invoked by petitioner."

The contrary being true that Ward had on March 4th, 1889, a vested right in the insurance on his life, not a vested right in sum of $1,000.00, but a vested right to resign from the police force "for bad health or bodily infirmity," and to receive and be paid from said fund the sum of $264.00 which he had contributed thereto.

He had also a vested right in the net value of his policy, as defined in § 452 of Civil Code as amended April 1st, 1878, p.
45 83 of amendments to the Codes of 1878, and said right "was capable of instant and present valuation."

Carr *v.* Hamilton, 9 U. S. S. C. R., 296.

These rights could not be taken away by an act of the Legislature without violating the provision of the Federal Constitution which forbids the State to deprive any person of property without due process of law.

Twelve.

In not allowing to petitioner the sum contributed by Ward to said life insurance fund or such other sum as equity would require.

Thirteen.

In holding to be valid § 13 of the pension law of March 4th, 1889, which denies to us our insurance which we have paid for.

46 That in the decision on the validity of the statute of March 4th, 1889, on the ground of repugnancy of said statute to the Constitution of the United States, the decision is in favor of the validity of said statute, and in the errors above stated the plaintiff in error and Edward A. Ward, deceased, have been deprived of property by the State of California without due process of law, and denied by said State the equal protection of the law, contrary to article XIV of the Federal Constitution.

Wherefore the plaintiff in error prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

ALFRED CLARKE,
Attorney for Plaintiff in Error.

47 Indorsed: In the Supreme Court of the United States. Pennie, &c., plaintiff in error, *vs.* Treasurer, &c., defendant in error. Assignment of errors and prayer for reversal. Filed Sept. 21st, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

48 In the Supreme Court, State of California.

JAMES C. PENNIE, Administrator of the Estate of Edward A. Ward, Deceased, Plaintiff,
vs.
THE TREASURER OF THE POLICE LIFE AND HEALTH Insurance Fund of the City and County of San Francisco, Defendant.

I, J. D. Spencer, clerk of the supreme court of California, do hereby certify that the foregoing 47 written pages, numbered from 1 to 47, both inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error, and pages 27 and 46, hereto annexed, are a true copy of the assignment of error in said cause.

49 Witness my hand and seal of the court this 23 day of September, A. D. 1889.

[Seal Supreme Court of California.]

J. D. SPENCER, *Clerk,*
By FRANK MYERS,
Deputy Clerk.

Endorsed on cover: California supreme court. No. 1260. James C. Pennie, administrator of the estate of Edward A. Ward, deceased, plaintiff in error, *vs.* C. Reis, Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco. Filed September 30, 1889.

Office Supreme Court U. S.
FILED,
NOV 29 1889
JAMES H. McKENNEY,
CLERK

1260. OCTOBER TERM, 1889.

IN THE SUPREME COURT OF THE UNITED STATES.

PENNIE, ADMINISTRATOR, PLAINTIFF IN ERROR,

vs.

REIS, TREASURER, ETC., DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED CLARKE,
Counsel for Plaintiff in Error.

DAVIS LOUDERBACK, ESQ.,
Counsel for Defendant.

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Respondent holds this fund not as county treasurer, but as treasurer of this insurance fund, and respondent is expressly "prohibited" by § 10 of said act of 1878, p. 879, "from depositing, pledging, or in any way parting with the possession of the securities, belonging to this fund, except on the order of said board."

This fund is not public money, but is the private money of our insurance fund. Yet the court below, in the absence of any averment in the pleadings that our fund was public money, and without any proof on the subject, (although proof in the absence of averment, would not have been admissible) *erroneously, as we claim,* holds this fund to be public money.

This holding of our court is not supported by the pleadings, for the pleadings show that we contributed this $2.00 per month out of our salaries, for a life insurance on the terms and conditions prescribed by said act of 1878, p. 879, and that this fund is *not* public money but *is* private money.

The court below fails to notice the decisions of this court "that the insured has a property right in the equitable value of his life insurance" as held in

> N. Y. L. Ins. Co. *v.* Statham, 93 U. S. R.
> Scammon *v.* Kimball, 92 U. S., 362.
> Carr *v.* Hamilton, 9 U. S., S. C. R., 296.

On March 4, 1889, the legislature passed the police pension act which, as construed by the court below, abolishes Ward's insurance and transfers his contribution to the pension fund, and this is done without restoring any part of the premium already paid by Ward and in plain disregard of art. 1 §10 of the U. S. constitution and the decisions of this court explanatory of the same and also of the non-fortfeiture insurance law, passed April 1, 1878, as we shall presently show. Ward died nine days afterwards, and plaintiff in error claims the insurance on the life of said deceased.

Payment has been refused by respondent, although he has $40,000.00 in hand applicable to pay us.

The federal question whether Ward can be deprived of his property rights in said fund by an act of the legislature is raised by the petition in the court below, and the decision being against us on the federal question we come here on writ of error to reverse that decision.

Assignment of error and prayer for reversal.

To the honorable the supreme court of the United States:

The plaintiff in error specifies the errors of which he complains as follows:

The supreme court of California erred:

One.

In holding "This contention goes upon the theory that the deceased had a vested property right in the thousand dollars of public money which [28]* the statute had at one time directed to be paid to his legal representative upon the happening of the contingency of his death."

*NOTE.—The bracket numbers in this assignment correspond with the folio numbers in the printed transcript.

There is a double error in this statement.

1st. The petitioner did not so contend.

2d. This insurance fund is not public money.

First. The issues in our case must be determined by the pleadings.

Our petition being met by respondent's demurrer, must be taken to be true.

The petition alleges that "Ward contributed out of his salary as a police officer the sum of $2.00 per month for each and every month from April 1st, 1878, to and including the month of March, 1889, to the police life and health insurance fund, and the amount of said Ward's contribution to said fund was and is $264.

That Ward died on March 13th, 1889, and was a police officer and a member of the police force of said city and county at the time of his death.

That petitioner is the legal representative of said Ward.

That there is due to petitioner as the legal representative of said Ward the sum of $1000, payable out of said fund by respondent.

That it was and is the duty of respondent to pay said sum of $1000.

That payment of said sum of $1000 was demanded [30] by petitioner, and refused by respondent.

That respondent refused to pay said claim on the ground that §13 of the act of March 4th, 1889, p. 59, excuses him from paying said claim.

"That at the time of said demand respondent had $40,000 in his possession, applicable to pay this just claim of petitioner."

These allegations are admitted by respondent to be true.

The petitioner claims that on the above admitted facts Ward had on the 3rd of March, 1889, a vested right in an insurance on his life by a solvent insurer for the sum of $1,000.00, payable on his death.

The rights of the insurer and the insured are reciprocal and are declared and defined by [31] many statutes and decisions, and among the rights which Ward possessed on March 3rd, 1889, was the right to "resign from the police force for bad health or bodily infirmity," in which case the statute provided "there shall be paid to him from said fund the amount of the principal sum which he had contributed thereto."

This right to resign was vested, and the right to be paid the $264.00 would not vest until the resignation had been offered.

Ward had the further right to be paid from said fund a portion "of his contribution to said fund," in case of dismissal from office for incompetency; and, if dismissed for crime, his forfeiture would be adjudged by the judicial power, as held in Ieck *v.* Anderson, 57 Cal., 251 [32]. Ward had also a vested right on March 3rd, 1889, to the surrender value of his insurance, as defined in §§451-2 of the civil code, passed April 1st, 1878; pp. 82-3 of amendments to codes 1878.

The amendments, being passed on the same day as the statute on which our insurance claim is based, become a part of our insurance law, because the laws of the state will be read together.

Ward also had on March 3rd, 1889, a vested right to the enjoyment of the insurance on his life, because "every person has an insurable interest in the life of himself," etc. §2,763, civil code.

"A policy of insurance upon life or health may pass by transfer, will or succession to any person, whether he has an insurable interest or [33] not; and such person may recover upon it whatever the insured might have recovered." §2,764, civil code.

"A thing, of which there may be ownership, is called property." §654, civil code.

Ward, as shown by the pleadings, was the owner immediately before the passage of the act of March 4th, 1889, of an insurance on his life, and not (as our court supposes that we had contended) of "a vested property right in the $1,000.00," * * * for which he was insured.

The ownership claimed for Ward was the right to surrender his insurance and receive his premiums or "contribution to said fund," or to make his will and dispose of his property, and any other rights which the law gives an insured person in the fruit which [34] may be realized on life insurance.

These rights could not be taken from Ward by the act of March 4th, 1889, and the attempt violates the 14th article of the United States constitution.

Second. This insurance fund *is not public money.*

There is no allegation in any pleading before the court that this fund is public money.

The contrary appears from the petition.

The petition shows that Ward contributed *out of his salary* the sum of $2.00 per month for eleven years to this insurance fund.

This is admitted by the demurrer of respondent.

This $40,000 is not public money of the city applicable to any public purpose or subject to be [36] disposed of by legislative act, but said $40,000 is the private money of our life insurance fund and belongs to the contributors, and the respondent holds said $40,000 as trustee of an express trust under §2216 of the civil code, and said fund is subject to be disposed of as provided by the law under which it was created, and cannot be otherwise disposed of without violating the provision of our federal constitution which forbids the state to deprive any person of property without due process of law.

> [35] "All property has an owner whether that owner is the state and the property public or the owner an individual and the property private." §669 civil code.
>
> Our petition shows, "nor does respondent deny that said Ward was a contributor to said fund, and insured therein as aforesaid."

This is admitted to be true by the demurrer of respondent.

The contributions of a policeman out of his salary, wages, or compensation for the purpose of securing an insurance on the life of the contributor are not public money, while they lie in such insurance fund.

Two.

In holding that Ward "had a mere expectancy which could have none of the elements of a vested right until the contingency contemplated by the statute had happened."

Whereas Ward truly had a vested interest in an [37] insurance which was terminable in five different ways:

First. By his death while a member of said police force.

In this contingency the insurance bore its full fruit of $1,000, and said sum constituted a part of his estate, and was subject to his funeral expenses, expenses of his last sickness, expenses of administration, and in some cases to the payment of his debts. It was also a property right which might pass by transfer, will or succession under §2764 of our civil code.

Second. By his resignation from bad health or bodily infirmity.

In this contingency his insurance was cancelled, and the full amount of his contribution was to be paid to him.

[38] *Third.* In case of his dismissal for mere incompetency "such officer shall be paid out of said fund such amount as said board may award not exceeding one-half of the sum he may have contributed to said fund."

Fourth. By a judgment of forfeiture which necessarily must be pronounced by due process of law.

Fifth. In case of resignation in good health, by rescision or adjustment under §§451-2 of the civil code, as amended April 1st, 1878, pp. 82-3 of amendments.

Three,

In holding that when Ward died "there was no statute which gave his death any significance."

The contrary rule that the repeal of a statute does not affect [39] rights acquired under it has been declared in Chae C. Ping *v.* U. S., May 13th, 1889; 9 U. S. S., C. R., 631; Society *v.* New Haven, 8 Wheat., 485-495, and is the law of this court. 79 Cal. 45;

Four,

In failing to notice that §13 of the act of March 4th, 1889, *discriminates* against Ward and others in like situation, and takes the wages, salary and compensation they have earned, and devotes this wages, salary and compensation, including this $264.00 of Ward's money, to pension other persons, and thereby *deprives* and *despoils* Ward and others, who are in the same class with him, of the beneficial *value of their insurance*, for the benefit of the class of pensioners, among whom may be "persons who were dismissed from the police force within one year prior [40] to the 4th of March, 1889, for incompetency or inefficiency."

§13 quoted in full pp. 41-2 post.

Thus making *one servient class* whose property is taken away, in favor of *a dominant class* who gain the money of which the servient class is unlawfully *despoiled,* by an act of the legislature, which act, being violative of the 14th article of the United States cc cannot be held to be due process of law, *said discriminc* "*class legislation* operating in favor of some, and *disc* against others in like circumstances, and thereby *invadi* *stantial right*" of Ward and persons in the same class "to an insurance on his life, which has *an instant and present valuation,*" as held by this court in Carr *v.* Hamilton, 9 U. S. S. C. R., 296.

This *discrimination* against Ward and those in his class [41] in favor of the pensioners, and those in their class all being in the same business, "*is forbidden* by the 14th article," as construed by this court in Soon Hing *v.* Crowley, 113 U. S. R., 703, "and is *discriminating legislation in an invidious sense.*"

The police power of the state affords no warrant for such an exercise of the legislative power as should *subvert our right* "to our insurance already paid for" to the date of our death.

"This *discrimination is illegal* and is a *denial of the equal protection of the laws* and violates the 14th article United States constitution."

Because this court has held that "the insured has an equitable right to have the amount of his premiums restored to him." * * * "He is fairly entitled to have the equitable value of his policy." [42] N. Y. *v.* Statham, 93 U. S. R., 34.

The pension bill having made no provision for the cancellation of Ward's insurance, said Ward remained an insured person, and upon his death the right to his insurance vested in his legal representative.

Five.

In overlooking the provision of §11 of the police insurance law of April 1, 1878, statutes 1878, p. 882, that "in case any police officer shall resign from bad health or bodily infirmity there shall be paid to him from said fund the amount of the principal sum which he shall have contributed thereto."

Six.

In holding that the legislature could appropriate the $264.00 of salary already earned by Ward, and contributed by him to the police life and health insurance fund as premiums on the insurance of $1,000.00 [43] on his life.

Seven.

In overlooking the provision of the non-forfeiture, life insurance law passed April 1st, 1878, as §45[illegible] of the civil code of Califor nia amendments to codes 1878, p. 83.

Eight.

In holding that Ward was not insured at the time of his death.

Nine.

In applying the doctrine of Miller *v.* Kister, 68 Cal., 144, Miner *v.* Solano, 26 Cal., 118, Attorney-General *v.* Squires, 14 Cal., 13, and People *v.* Haskill, 5 Cal., 357, to our case as we are not seeking to hold office or salary against the legislative will.

Ten.

In applying to our case the plenary power of the legislature over officers of its creation, which power is prospective, as to duties and salaries, and is not retrospective so as to affect [44] a forfeiture of a salary already earned, or a life insurance fully paid for.

Eleven.

In holding that the act of March 4th, 1889, did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner. The contrary being true, that Ward had on March 4th, 1889, a vested right in the insurance on his life, not a vested right in the sum of $1,000.00, but a vested right to resign from the police force "for bad health, or bodily infirmity," and to receive and be paid from said fund the sum of $264.00 which he had contributed thereto.

He had also a vested right in the net value of his policy as defined in §45[illegible] of civil code as amended April 1st, [45] 1878, p. 83, of amendments to the codes of 1878, and said right "was capable; of instant and present valuation." Carr. *v.* Hamilton, 9 U. S. S. C. R., 296. These rights could not be taken away by an act of the legislature without violating the provision of the federal constitution which forbids the state to deprive any person of property without due process of law.

Twelve.

In not allowing to petitioner the sum contributed by Ward to said life insurance fund, or such other sum as equity would require.

* *Thirteen.*

In holding to be valid §13 of the pension law of March 4th, 1889, which denies to us our insurance which we have paid for [46]. * pp. 41-2 post.

Federal Question.

That in the decision on the validity of the statute of March 4th, 1889, on the ground of repugnancy of said statute to the constitution of the United States, the decision is in favor of the validity of said statute, and in the errors above stated the plaintiff in error and E. A. Ward deceased have been deprived of property by the state of California without due process of law, and denied by said state the equal protection of the law contrary to article XIV. of the federal constitution.

Statement of law.

Act of April 1st, 1878, p. 879, §2 * * * "the compensation of the police officers in office at the time of the passage of this act shall continue at the amount or rate established by the act or acts under which they have been appointed," etc. * * * "subject to the condition that the treasurer of said city and county shall retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as 'the police life and health insurance fund,' which said fund shall be administered as is provided in sections nine to thirteen, inclusive, of this act."

§5. "The police officers now in office shall continue to be paid in the manner and out of the fund the same as before the passage of this act." (P. 880.)

§9. "That the mayor, auditor and treasurer of the city and county of San Francisco shall constitute a board known as 'the police life and health insurance board.'"

§10. "The said board shall from time to time, as in their judgment may be best, invest the moneys of 'the police life and health insurance fund,' in such of the following securities as shall seem the most safe and profitable, namely:

"The bonds of the city and county of San Francisco, the bonds of the state of California, the bonds of the United States of America; and the securities shall be held by said treasurer subject to the order of said board, and the said treasurer shall have no power to deposit, pledge, or in any way part with the possession of said securities, or the evidence thereof, except on the order of said board."

§11. "Upon the death of any member of the said police force, after the first day of June, eighteen hundred and seventy eight, there shall be paid by the treasurer out of said 'life and health insurance fund' to the legal representative of said police officer the sum of one thousand dollars.

"In case any police officer shall resign from bad health or bodily infirmity, there shall be paid to him from said fund the amount of the principal sum which he shall have contributed thereto.

"In case of dismissal of any police officer for mere incompetency not coupled with any offence against the laws of the state, such officer shall be paid from said fund such amount as the board may award, not exceeding one-half of the sum he may have contributed to said fund.

"Any officer dismissed for gross neglect or violation of duty, or upon conviction of any misdemeanor or felony, shall forfeit all claim upon said fund."

§12. "In case such fund shall not be sufficient to pay the demand upon it, such demand shall be registered and paid in the order of its registry out of the funds as received."

§13. "The said mayor, auditor and treasurer shall receive no compensation for their services as members of said board, nor shall the said treasurer receive any compensation as treasurer and custodian of said funds." (Stat. 1878, p. 882.)

"Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired peculiar and appropriate meaning in law are to be construed according to such peculiar and appropriate meaning." (Code of civil procedure, §16.)

"The terms of a writing are presumed to have been used in their primary and general acceptation." (Code of civil procedure, §1,861.)

"Such a construction is if possible to be adopted as will give effect to all statutes." (Code of civil procedure, §1,858.)

"Technical words are to be interpreted as usually understood by the persons in the business to which they relate." (§1,645 civil code.)

These provisions of the codes were in force when our police life and health insurance law was passed, and on the same day §§451-452 were added to the civil code, and contain the following:

§451. "Under any policy of insurance on life hereafter issued and delivered in this state, whether by a person or corporation organized under the laws of California, or under those of any other state or country, the holder thereof, at any time during the continuance of the policy, shall be entitled to claim and recover of the insurer, any stipulation or condition of forfeiture contained in the policy or elsewhere to the contrary notwithstanding, a surrender value to be determined as follows: The net value of the policy, at the time of demand upon the insurer for settlement and liquidation of the same, shall be ascertained according to the American experience rate of mortality, with interest at four and one-half per cent per annum; from such value shall be deducted and cancelled any indebtedness of the assured, growing out of the policy, and a surrender charge to the company to be ascertained as follows: Assuming the rates of mortality and interest as aforesaid, the present value of all the future contributions of the policy to pay death claims, or in other words, of all the normal future yearly costs of insurance, which by its terms it is exposed to pay in case of its continuance shall be calculated, and eight per cent of this sum shall be the legal surrender charge, and the remainder of the net value of the policy ascertained as aforesaid, after deducting this surrender charge, and any debts due the insurer, as aforesaid, shall be payable to the insured in cash, 'within sixty days after the amount is ascertained.' If there shall not have been a settlement and liquidation of the policy as hereinbefore provided, and it shall have lapsed by reason of the non-payment of a premium, the insurer must, nevertheless, continue it in force as provided in the next ensuing section."

§452. "The net value of the policy, at the expiration of the term for which the full amount of premiums shall have been paid, must be ascertained and determined in accordance with the formula set forth in the preceding section, after deducting from such net value any indebtedness to the insurer, growing out of the policy, and canceling the same, and deducting also a surrender charge, as ascertained in accordance with the provisions of said preceding section, the remainder of such net value shall be considered as a net single premium of insurance, and in the case of any policy, other than an endowment, the amount which it will insure as a life policy shall be determined according to the age of the insured at the time of the lapse of the policy, and the rates of mortality and interest assumed in determining the net value of the same. * * *

"As thus adjusted the policy is to be considered as continued in force, in accordance with its original terms, except for a smaller amount, which said amount shall be by the company indorsed on the policy as paid up insurance." (Amendments to the codes of 1878, pages 82 and 83.)

"Every life insurance corporation organized under the laws of this state must on or before the 1st day of February in each year furnish the insurance commissioner the necessary data for determining the valuation of all its policies outstanding on the 31st day of December, then next preceding." (Stat. 1889, p. 35 §447 passed Feb ~~July~~ 25, 1889.)

On said 1st of April, 1878, there was in force.

"The thing of which there may be ownership is called property." (§654 of the civil code.)

"Every person has an insurable interest in the life of himself," etc.

§2,763 of civil code:

§2764. "A policy of insurance upon life or health may pass by transfer, will or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured ~~interest~~ might have recovered."

The court below held our insurance fund to be public money.

In order to show the error of this view, the following provisions of law are cited:

"On or before the first Monday in May, annually, the board of supervisors shall levy the amount of taxes * * for state and county purposes. * * Said amount to be sufficient to provide for the payment of all demands upon the treasury thereof, authorized by law to be paid out of the same. * * Said board shall * * in making the said levy of said taxes, apportion and divide the taxes so levied, and to be collected and applied to the several specific funds known as the corporation debt fund, general fund, school fund, street light fund and street department fund, according to the estimate of said board of the necessities of said fund, except that the rate for the school fund shall not exceed thirty-five cents on each one hundred dollars valuation of property, and *provided further*, that the said board shall authorize the disbursement of said money for the purposes hereinafter mentioned, and at the close of each fiscal year the said board shall direct the treasurer to transfer all surplus moneys of all funds, excepting the school fund, after liquidating or providing for all outstanding demands upon said funds, to the general fund; but no money shall be transferred from either of the said funds to another; nor used in paying any demands upon such other fund, until all the indebtedness arising in any fiscal year, payable out of said funds so raised for said fiscal year shall have been paid and discharged.

* * The general fund shall be applied and used for the payment of all sums authorized by law to be paid out of the general fund, and not otherwise provided for in this act." Section 71 of consolidation act (as amended March 26, 1866; statute 1865–6, page 436.)

"No county, city, town or township board of education, or school district, shall incur any indebtedness or liability, in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." (Constitution of Cal., 1879, art. XI., ¿18.)

In commenting on this provision our supreme court has said:

"No indebtedness or liability should be incurred (except in the " manner stated) exceeding in any year the income and revenue " actually received by such county, city, town, township board of " education, or school district.

"In other words that each year's income and revenue must pay each " year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or " revenue of any future year.

"The system previously prevailing in some of the municipalities " of the state, by which liabilities and indebtedness were incurred " by them far in excess of their income and revenue for the year in " which the same were contracted, thus creating a floating indebtedness, which had to be paid out of the income and revenue of future " years, and which, in turn, necessitated the carrying forward of " other indebtedness, was a fruitful source of municipal extravagance. " The evil consequences of that system had been felt by the people " at home and witnessed elsewhere.

"It was to put a stop to all of that, that the constitutional provision in question was adopted.

"The change was eminently wise."

S. F. Gas Co. *v.* Brickwedel, 62 Cal., 642. Dec., 1882.

"The court will take judicial knowledge of the law." ¿1875 code civil pro.

"A city order is a law of this state." *Re* Lawrence, 69 Cal., 611.

"A reference to a city order by number, date and the substance of its provisions was *held* sufficient." *Exparte* Miranda, 73 Cal., 365.

Let us follow this money from the pocket of the tax-payer until it reaches this fund.

We trace the tax levy as follows.

Revenue orders in substance and effect as follows:

ORDER No. 1994—PROVIDING REVENUE FOR MUNICIPAL PURPOSES FOR the fiscal year ending June 30, 1889.

The People of the City and County of San Francisco do ordain as follows:

SECTION 1. Under and in pursuance of Acts of the Legislature of the State of California, and in conformity thereto, and under and in pursuance of various municipal orders and ordinances, and in conformity thereto, there is hereby levied a tax for city and county purposes for the fiscal year ending June 30, 1889, on all property, both real and personal, in the City and County of San Francisco, excepting such property as is by law exempt from taxation, the sum of one hundred and six and 70-100 cents ($1.0670) on each one hundred dollars ($100) valuation of said taxable property upon the assessment book for the said fiscal year, which sum of one hundred and six and 70-100 cents ($1.0670) on each one hundred dollars ($100) valuation, as aforesaid, is hereby apportioned to the funds and accounts known and designated as follows:

General Fund	.5951
Street Light Fund	.1040
Street Department Fund	.0956
School Fund	.0860
Library Fund	.0112
Park Improvement Fund (maintaining and improving Golden Gate Park)	.0300
City Hall Construction Fund	.1000
Interest Account, Park Bonds 1874–5	.0049
Interest Account, Hospital Bonds	.0047
Interest Account, House of Correction Bonds	.0044
Interest Account, City Hall Construction Bonds	.0075
Sinking Fund, Hospital Bonds	.0022
Sinking Fund, City Hall Construction Bonds	.0135
Sinking Fund, House of Correction Bonds	.0035
Sinking Fund, Park Bonds 1873–4	.0044
	$1.0670

In Board of Supervisors, San Francisco, June 25, 1888.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Curran, McDonald, Boyd, Pescia, Bush, Burns, Hawkins, Heyer, Lambert, Joost, Morton.

Absent—Supervisor Knorp.

JNO. A. RUSSELL, Clerk.

Approved, San Francisco, June 25, 1888.

E. B. POND,

Mayor and ex-officio President Board of Supervisors.

The following are the revenue orders, under which our fund, which now contains $40,000, has been raised:

Order No. 1,367, providing revenue for municipal purposes for the year 1877–8, passed June 25, 1877.

Order No.	1442,	year	1878–9,	"	"	25, 1878.
" "	1506	"	1879–80	"	"	23, 1879.
" "	1584	"	1880–1	"	July	6, 1880.
" "	1635	"	1881–2	"	June	27, 1881.
" "	1681	"	1882–3	"	"	26, 1882.
" "	1720	"	1883–4	"	"	25, 1883.
" "	1772	"	1884–5	"	"	23, 1884.
" "	1818	"	1885–6	"	"	22, 1885.
" "	1865	"	1886–7	"	"	28, 1886.
" "	1919	"	1887–8	"	"	27, 1887.
" "	1994*	"	1888–9	"	"	25, 1888.

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*Order 1994 is printed above.

These 12 tax levies are similar (except the dates) to order 1994 which is printed above.

In each fiscal year from 1883 to the present time the board of supervisors passed an order in substance and effect as follows:

ORDER No. 1783.—REGULATING AND DESIGNATING THE LIMIT OF EXpenditures of the various offices and departments of the City and County of San Francisco, as estimated and provided for the fiscal year ending June 30, 1885.

The People of the City and County of San Francisco do ordain as follows:

SECTION 1. That each and every board, officer and department of the City and County Government shall be and is hereby restricted and limited in their several and respective expenditures during each fiscal year to the actual amount of money estimated as sufficient for such board, officer or department at the time of making the annual tax levy providing funds for the maintenance of the City and County Government for such fiscal year, and to one-twelfth part thereof in each month.

SECTION 2. That the amount of such estimate provided by the Board of Supervisors for the various boards, officers and departments for the fiscal year ending June 30, 1885, is as follows, viz.:

* * * * * * * * * * * * * * * *

Police Force salaries (5 Captains $9,000, 1 clerk to Chief of Police $1,800, 1 Property Clerk $1,800, 12 detectives $18,000, 25 sergeants $37,500, 12 corporals $16,850, 349 police officers $427,175........................512,125 00

Approved September 3, 1884.

These orders are:

No.	1730	passed	August	30,	1883,	$512,125 00.
"	1783*	"	September	3,	1884	512,125 00.
"	1822	"	July	14,	1885	512,125 00.

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*Order 1783 is printed above.

" The difference ($18 per annum during his life) is called equitable
" value of his policy.

" The present value of the assurance on his life exceeds by this
" amount what he has yet to pay. Indeed, the company, if well
" managed, has laid aside and invested a reserve fund equal to this
" equitable value to be appropriated to the payment of his policy,
" when it falls due. This reserve fund has grown out of the premi-
" ums already paid.

" IT BELONGS IN ONE SENSE TO THE INSURED who has paid them,
" somewhat as a deposit in a savings bank is said to belong to the
" person who made the deposit. * * *

" The policy has a real value corresponding to it, a value on which
" the holder often realizes money by borrowing. * * * To
" forfeit this excess which fairly belongs to the assured and is
" fairly due from the company, and which the latter actually has in
" its coffers * * * would be rank injustice.

" It would be taking away from the assured that which had already
" become substantially his property.

" It would be contrary to the maxim that no one should be made
" rich by making another poor." * * *

N. Y. Life Ins. Co. *v.* Statham, 93 U. S. R., 30–35.

" I think the complainants are entitled to a decree declaring the
" contracts at an end, and giving to them an allowance against the
" company for the amount of the surrender value of their policies."

Ingersoll *v.* Mo. V. L. I. Co., 37 Fed., 530.

" The defendant is a chartered corporation founded by individuals
" on their own funds, and for their own emolument. The government
" of the corporation is fixed by the charter, and is unalterable, except
" by its own consent.

" Its property, also, is as secure as that of the individual citizen.
" Whatever advantages it has obtained by the grant of the state,
" they are exclusive to corporation. University *v.* Maultsby, 8 Ired.
" Eq., 257. All contracts between the corporation itself and the
" stock-holders, which are made pursuant to the charter are eq-
" ually inviolable. So, whether we consider the corporation as a
" trustee for the dividend holder, as was insisted by the plaintiff,
" or as a debtor to the share-holder for the dividend declared, both
" relations between the parties are the result of contract, and the
" state is inhibited from stepping between the corporation and its

" stock-holders, and changing or modifying these contract relations " between them or between the state and the corporation without " their concurrence. 4 Wheat., 518; 6 How., 310; 3 Id., 133; " Cooley on Const. Lim., 126–7. So, whether we view the act of " the legislature in the light of the constitution ot fhe United States " as impairing the obligation of a contract, or in the light of our " state constitution, as conflicting with the provision which declares " that no person shall be disseized or deprived of his property, but " by the law of the land, or whether it be considered in the light of " plain and obvious principles of common right and common reason, " we cannot find sufficient support to authorize the court to declare " it to be a valid and existing law. It was based upon a misapprehension of the proper construction of article 9, §6, of the constitution. University *v.* N. C. Railroad Co., 76 N. C., 103. 22 Am. " Rep., 674."

A testator bequeathed the residuum of his estate to the Virginia Literary Fund, a corporation composed only of officers of the State.

" Subsequently to his death the legislature by enactment appro" priated the fund to the Brooke academy, an incorporated private " educational institution. Held unconstitutional."

Trustees of Brooke Academy *v.* George, 14 W. Va., 411.
35 Am. Rep., 760.

" The proposition advanced, that a corporation cannot, without " the consent of the share-holders, abandon the fundamental pur" pose for which it was organized, and engage in transactions or " embark its capital in enterprises other than those which come " legitimately within the scope of its charter, is abundantly " maintained. Green's Brice, Ultra Vires, 77. Accordingly, it is " the established rule that a stock-holder, or other person interested, " who has not consented, may invoke the aid of a court of chancery " to restrain the managing directory from engaging or continuing " in an enterprise which involves a material change in the original " purposes or powers of the corporation, and which is not in aid of " its primary object. Board *v.* Railroad Co., 50 Ind., 85; McCray " *v.* Railroad Co., 9 Ind., 358; Bradley *v.* Ballard, 55 Ill., 413; " 1 Mor. Priv. Corp., §§273–274. This rule is neither technical nor " arbitrary, but has for its foundation the means of affording pro" tection to stock-holders, who resort to it in good faith for the " purpose of holding the corporation to the prosecution of its legiti-

" mate and proper business. Holt *v.* Bank, 25 Fed. Rep., 812;
" Cited in Wright *v.* Huges, 21 N. E. R., 908."

" We may observe, *in limine*, that it is now too well settled to
" admit of debate, that a state may enter into a valid contract with
" a private person, and that it can no more impair the obligation of
" the contract by subsequent legislation than if the contract was
" between two or more citizens. Nor is it necessary, in order to
" support such a contract, that there should be a consideration
" moving from the other party to the state. It will be sufficient if,
" on the faith of the contract, the other party has been induced to
" invest his money or to employ his time and labor in furtherance
" of the enterprise which is the subject-matter of the contract. But
" in all this class of cases, the first point to be established is, of
" course, the existence of the contract itself. In most of the cases
" to which we have been referred by counsel, there was little or no
" difficulty on this point. In *Fletcher* v. *Peck*, 6 Cranch, 87, certain
" lands had been granted by the state of Georgia to private persons,
" and the legislature, by a subsequent statute, attempted to annul
" the grant. The court held the grant to be an executed contract,
" and within the protection of the federal constitution. In the *State*
" *of New Jersey* v. *Wilson*, 7 Cranch, 164, the legislature passed an
" act authorizing a purchase of lands for certain Indians, in consid-
" eration of the relinquishment by the Indians of certain other lands.
" The act contained a provision that the lands so purchased should
" be exempt from taxation. A subsequent act attempted to repeal
" the statute exempting the lands from taxation, and the court held
" that the first act created a contract, which could not be annulled
" by the subsequent act. The case of the *State Bank of Ohio* v.
" *Knoop*, 16 How., 369, involved a similar principle. In *McGee* v.
" *Mathis*, 4 Wall., 143, the state of Arkansas passed an act for the
" sale of certain swamp lands, and, in order to encourage their re-
" clamation, provided that they should be exempt from taxation for
" a certain term. The court held this to be a contract that the lands
" should not be taxed during the term. In *Wilmington R. R.* v. *Reid*,
" 13 Wall., 264, the legislature, in chartering the railroad com-
" pany, authorized it to purchase property for the use of the road,
" and provided that the land should be free from taxation. Under
" a subsequent act, a tax was levied upon the franchise of the com-
" pany, and the court held the first act to be a contract exempting
" the franchise from taxation. The other cases cited by counsel all

" rest upon analogous provisions, and in none of them was there a " reasonable doubt as to the existence of the contract."

Floyd *v*, Blanding, 54 Cal., 45.

" The validity of a contract cannot be impaired by state legisla-" tion, for it is protected from such an attack by an express provi-" sion of the federal constitution."

" Any law, therefore, which changes the character of the obliga-" tion, either by diminishing or increasing its burden is void, be-" cause it impairs the obligation."

Douglass *v*. Pike Co., 101 U. S., 677.
McCracken *v*. Hayward, 2 How., 608, 612.
Ogden *v*. Saunders, 12 Wheat., 213.
People *v*. Ingersoll, 58 N. Y.
Goggans *v*. Turnipseed, 1 S. C., 40 (7 Am. Rep., 23).
Stein *v*. Mobile, 49 Ala., 362 (20 Am. Rep., 283).
Van Baumback *v*. Bade, 9 Wis., 559.

" And the constitutional prohibition applies to changes in the " state constitutions as well as to amendments of the statutes."

White *v*. Hart, 13 Wall., 646.
Osborn *v*. Nicholson, 13 Ark., 654.
Oliver *v*. Memphis, etc., R. R. Co., 30 Ark., 128.
Jacoway *v*. Denton, 25 Ark., 641.

" The charter cannot be so amended or repealed as to interfere " with the vested rights of property, which the stock-holders may " have acquired by and through the corporation."

Holyoke Co. *v*. Lyman, 15 Wall., 500.
Inland Fishery Commissioners *v*. Holyoke Water Power Co., 104 Mass., 446.
Worchester *v*. N. and W. R. Co., 109 Mass., 103.
Thornton *v*. Marginal Freight Railway, 126 Mass., 32.

" Any attempt under the guise of police regulations to repeal or " amend the charter, or to abridge any of the corporate rights and " privileges, would, of course, be unconstitutional and void."

" The property of the corporation cannot be confiscated, under " pretense of being a police regulation, without payment of com-" pensation."

State *v*. Noyes, 47 Me., 189.
Washington Bridge Co. *v*. State, 18 Conn., 53.
Benson *v*. Mayor, etc., of N. Y., 10 Barb., 223.

Hegemen *v.* Western R. R. Co., 13 N. Y.
Commonwealth *v.* Pennsylvania Canal Co., 66 Pa. St., 41.
Bailey *v.* Philadelphia, etc., R. R. Co., 4 Harr., 389.
People *v.* Jackson, etc., Plank Road Co., 9 Mich., 285.
Attorney General *v.* Chicago, etc., R. R. Co., 35 Wis., 425.
Sloan *v.* Pacific R. R. Co., 61 Mo., 24.

"We deny that after having made an appropriation in view of a " contemplated contract to be based thereon, and such contract is " made, and funds to meet the appropriation are received into the " treasury, it can deprive the party with whom the contract is entered into of such funds by repealing the appropriation."

McCauley *v.* Brooks, by Field, Judge, July, 1860, 16 Cal., 35.

"The fund here raised is sacred to the objects to which the act " devotes it.

"The fund cannot be impaired or diverted from the object."

By Field, Judge, July, 1862.
Babcock *v.* Middleton, 20 Cal., 659.

"The repealing act is absolute in its terms, but it was not intended " that the repeal should affect past contracts, for that would have " been to impair their obligation, which the legislature had no power " to do."

Field, C. J., concurring Oct., 1862.
Creighton *v.* Pragg, 21 Cal., 119.

"In view of the facts of this case the validity of the bonds was not " affected by the repeal of the act of April 4th, 1870."

Town of Concord *v.* Savings Bank, 92 U. S., 630.
Steamship Company *v.* Joliffe, 2 Wall., 450.
Montgomery *v.* Rasson, 16 Cal., 189.
Nevada Bank *v.* Steinmitz, 64 Cal., 316.

"In 1863 the charter of 1858 was repealed and a new charter substituted. The repeal of the old charter did not impair the validity " of contracts made under its provisions."

Meyer *v.* Porter, 65 Cal., 69.
Potter *v.* Fowzer, 21 Pac., 118. 78 Cal. 493.

"Where a state has authorized a municipal corporation to contract, " and to exercise the power of local taxation to the extent necessary " to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied.

" The state and the corporation in such cases, are equally bound.

" The power given becomes a trust which the donor cannot annul, " and which the donee is bound to execute; and neither the state " nor the corporation can any more impair the obligation of the con- " tract in this way than in any other.

" The laws requiring taxes to the requisite amount to be collected, " in force when the bonds were issued, are still in force for all the " purposes of this case.

" The act of 1863 is, so far as it affects these bonds, a nulity.

" It is the duty of the city to impose and collect the taxes in all " respects as if that act had not been passed. A different result " would leave nothing of the contract, but an abstract right,—of no " practical value,—and render the protection of the constitution a " shadow and a delusion." 4 Wall., 535, 554.

" The prohibition of the constitution against the passage of laws " impairing the obligation of contracts applies to the contracts of " the state, and to those of its agents acting under its authority, as " well as to contracts between individuals. And that obligation is " impaired, in the sense of the constitution, when the means by " which a contract at the time of its execution could be enforced, " that is, by which the parties could be *obliged* to perform it, are " rendered less efficacious by legislation operating directly upon " those means."

Wolf *v*. New Orleans, 103 U. S. R,, 367.

" A contract is an agreement to do or not to do a certain thing."

Ogden *v*. Saunders, 12 Wheat., 213.
Sturgis *v*. Crowningshield, 4 Wheat., 122.

" Legislative enactments become contracts under this provision."

New Jersey *v*. Yard, 95 U. S., 114.

" A statute is a contract as to those who earn the bounty while it is in force."

Salt Co. *v*. E. Sag., 13 Wall., 373.

" The validity construction and remedy are parts of the obligation."

Green *v*. Biddle, 8 Wheat., 1.
Ogden *v*. Saunders, 12 Wheat., 213.
Bronson *v*. Kinzie, 1 How., 311.
McCracken *v*. Hayward, 2 How., 608.
Von Hoffman *v*. Quincy, 4 Wall., 535.

" The time, place, person, or thing to be done cannot be changed."

Townsend *v.* Townsend, Peck (Tenn.) 1.

" Such a construction would afford no warrant for an exercise of " legislative power under pretence and color of regulating as should " subvert or injuriously restrain the right itself."

Yick Wo *v.* Hopkins, 118 U. S. R., 356.

" No state can by any expression of legislative will lessen or impair the legal effect or obligation of any contract valid when entered into."

Plock *v.* Cobb, 64 Ala., 127.
Floyd *v.* Blanding, 54 Cal., 41.
Cole *v.* La Chambre, 31 La. An., 41.
La. *v.* N. O., 32 La. An., 493.
Danolds *v.* State, 89 N. Y., 36.

" The obligation of a contract is its binding force on the party " making it, have reference to the laws in existence, when the " contract is made."

Edwards *v.* Williamson, 70 Ala., 145.
N. B. *v.* Sebastian, 5 Dill., 415.

" Repealing a charter under which vested rights have been ac- " quired impairs the obligation of a contract."

Greenwood *v.* Freight Co., 105 U. S., 13.
S. L. C. *v.* Fitzpatrick, 3 Woods, 222.
Antoni *v.* Greenhow, 107 U. S. R., 769.
Hartman *v.* Greenhow, 102 U. S., 672.
Brewer *v.* Otol, 1 Neb., 373.
McCracken *v.* Moody, 33 Ark., 81.

"The state cannot extinguish the liability of a county as to " debts already accrued."

U. S. *v.* Lincoln, 5 Dill., 184.
U. S. *v.* Jefferson Co., 5 Dill., 310.
Sawyer *v.* Concordia, 12 Fed., 754.
U. S. *v.* Mobile, 12 Fed., 768.
State *v.* Police, 34 La. An., 95.
La. *v.* N. O., 34 La. An., 1,149.

"This fund cannot be impaired or diverted from the object."

Thornton *v.* Hooper, 14 Cal., 12.
Potter *v.* Fowzer, 21 Pac. Rep., 118. 78 Cal. 493.

"The legislature cannot alter the legal effect of a contract or vio-
" late its obligation."

King *v.* Dedham, 15 Mass., 477.
Ohio *v.* Debolt, 16 How., 416.
Gelpcke *v.* Dubuque, 1 Wall., 175.
Havemeyer *v.* Iowa, 2 Wall., 294.
Thompson *v.* Lee, 3 Wall., 327.
Mitchell *v.* Berlington, 4 Wall., 270.
Lee *v.* Rodgers, 7 Wall., 181.
City *v.* Lampson, 9 Wall., 477.
Chicago *v.* Sheldon, 9 Wall., 55.
White *v.* Hart, 13 Wall., 647.
Osborn *v.* Nicholson, 13 Wall., 655.
Alcott *v.* Sups., 16 Wall., 678.
Boyce *v.* Tabb., 18 Wall., 546.

"A contract cannot be impaired in the remotest degree."

Green *v.* Biddle, 8 Wheat., 1.
Von Hoffman *v.* Quincy, 4 Wall., 535.

"It is not a question of degree, manner or cause."

Sturges *v.* Crowninshield, 4 Wheat., 122.
Green *v.* Biddle, 8 Wheat., 1.
Planters' Bank *v.* Sharp, 6 How., 301; 12 Miss., 17.
Walker *v.* Whitehead, 16 Wall., 314; 43 Ga., 537.
Von Hoffman *v.* Quincy, 4 Wall., 535.
Gault's Appeal, 33 Pa. St., 194.
Farnsworth *v.* Reeves, 2 Cold., 111.
Winter *v.* Jones, 10 Ga., 190.

"But any deviation by postponement or acceleration of the period
" of performance, or imposing conditions not expressed, or dispens-
" ing with those expressed, is a violation of the obligation."

Green *v.* Biddle, 8 Wheat., 1.
McCracken *v.* Hayward, 2 How., 608.
People *v.* Bond, 10 Cal., 563.
Winter *v.* Jones, 10 Ga., 190.
Blanchard *v.* Russell, 13 Mass., 1.
Commercial Bank *v.* State, 12 Miss., 439.
West Riv. Br. Co. *v.* Dix, 6 How., 507; 16 Vt., 446.
McCauley *v.* Brooks, 16 Cal., 11.

" As compelling a party to do more than he has promised, or en-
" forcing payment before the debt becomes due."

Jones *v.* Crittenden, 1 Car. L. Repos., 385.
Townsend *v.* Townsend, Peck (Tenn.), 1.

" Any act of the legislature in contravention of a compact is an
" impairment of the obligation of a contract."

Green *v*, Biddle, 8 Wheat., 1.
Pennsylvania *v.* Wheeling, etc., Br. Co., 18 How., 433.

" To impair means to alter so as to make the contract more bene-
" ficial to one party and less to the other than by its terms it pur-
" ports to be."

Bailey *v.* Gentry, 1 Mo., 164.

" So the discharge of a contract is an actual impairment of the
" obligation."

Farmers' and Mechanics' Bank *v.* Smith, 6 Wheat., 137.

" Or where the contract is destroyed."

Robinson *v.* Magee, 9 Cal., 84.

" Or where an essential part is annulled."

New Jersey *v.* Wilson, 7 Cranch, 164.

" Or partially rescinded."

Grimball *v.* Ross, Charlt., 175.

" So the obligation is impaired by a statute which authorizes a
" discharge of the contract by a smaller sum, or at a different time,
" or in a different manner than stipulated."

Golden *v.* Prince, 5 Hall L. J., 502; 3 Wash. C. C., 313.
Edmonson *v.* Ferguson, 11 Mo., 344.

" As the alteration of the terms of a condition of a mortgage."

Bronson *v.* Kinzie, 1 How., 311.
Pool *v.* Young, 7 Mon., 587.

" Any means which lessens the validity gives diminished value, or
" which divests priority of lien, obligation, or recovery, violates the
" obligation."

Grimball *v.* Ross, Charlt., 175.

" Or anything which affects its validity."

Edwards *v.* Kearzey, 96 U. S., 595.
Planter's Bank *v.* Sharp, 6 How.; 301, 4 Smedes & M., 17.

" As where the obligation is diminished, weakened, or rendered " less operative."

Lapsley *v.* Brashears, 4 Litt., 47.
Nevitt *v.* Bank, 14 Miss., 513.

" A statute which releases one party from any article of a stipulation is a violation of the obligation."

Jones *v.* Crittenden, 1 Car. Law Rep., 385.
Pool *v.* Young, 7 Mon., 537.
Townsend *v.* Townsend, Peck (Tenn.) 1.
Greenfield *v.* Dorris, 1 Sneed., 548.

" The remedy enters into and forms a material part of the obligation of the contract."

Von Hoffman *v.* Quincy, 4 Wall., 535.
Walker *v.* Whitehead, 16 Wall., 314; 43 Ga., 537.
Gunn *v.* Barry, 15 Wall., 610; 8 Bank Reg., 1.
Johnson *v.* Higgins, 3 Met. (Ky.) 566.

" The validity and remedy of a contract are inseparable; both are " parts of the obligation."

Walker *v.* Whitehead, 16 Wall., 314; 43 Ga., 537.
Von Hoffman *v.* Quincy, 4 Wall., 535.
Scaine *v.* Belleville, 39 N. J., 10; Vroom 526.

" And a statute impairing the remedy is prohibited."

Bronson *v.* Kinzie, 1 How., 311.
Green *v.* Biddle, 8 Wheat., 1.
Smith *v.* Morse, 2 Cal., 524.
Johnson *v.* Duncan, 3 Mart., 531.
Coffman *v.* Bank, 40 Miss., 29.

" The obligation of the contract is the duty of performing it; and " if the law is so changed that the means of enforcing it are materially impaired, the obligation of the contract no longer remains " the same."

Bronson *v.* Kinzie, 1 How., 311.
McCracken *v.* Hayward, 2 How., 612.
Grantly *v.* Ewing, 3 How., 717.
Curran *v.* Arkansas, 15 How., 304.
Butz *v.* Muscatine, 8 Wall., 583.
Walker *v.* Whitehead 16 Wall., 314.

Olcott *v.* Supervisors, 16 Wall., 678.
Gunn *v.* Barry, 15 Wall., 623.
Jackson *v.* Lamphire, 3 Peters, 280.
Green *v.* Biddle, 8 Wheat., 1.
Edwards *v.* Kearzey, 96 U. S., 601.
Taylor *v.* Stearns, 18 Gratt., 244.
Nevitt *v.* Bank, 14 Miss., 513.
Von Baumbach *v.* Bade, 9 Wis., 559.

" Where the remedy is essential to the contract, the legislature " cannot take it away."

Thompson *v.* Commonwealth, 81 Pa. St., 314.

" It embraces those contracts which respect property, or some " object of value, and which confer rights that may be asserted in a " court of justice."

Fletcher *v.* Peck, 6 Cranch, 87.
Dar. Coll. *v.* Woodward, 4 Wheat., 518.
Butler *v.* Pa., 10 How., 402.
Trustees *v.* Rider, 13 Con., 87.
Regients *v.* Williams, 9 Gill. & J., 365.
Swan *v.* Buck, 40 Miss., 268.
Herrick *v.* Randolph, 13 Vt., 530.

" The character of the parties to a contract does not prevent the " application of this prohibition."

Trustees *v.* Rider, 13 Con., 87.
Regients *v.* Williams, 9 Gill & J., 365.

" Contracts include executed and executory."

Fletcher *v.* Peck, 6 Cranch, 137.
Van Hoffman *v.* Quincy, 4 Wall., 535.
Green *v.* Biddle, 8 Wheaton, 1.

" The instrument pledging public faith may be a contract or a " statute."

Bridge *v.* Hoboken, 1 Wall., 116.

" If the legislature pledges property to secure bonds, it cannot " subsequently divest the lien or postpone it."

Trustees *v.* Bears, 2 Black, 443.

"The obligation of a contract commences at its date and continues " until the debt is paid or the act performed."

Blair *v.* Williams, 4 Litt., 34.
Bayley *v.* Gentry, 1 Mo., 164.
Forsythe *v.* Marbury, R. M. Charl., 324.

" It extends to future possessions."

Edwards *v.* Kearney, 96 U. S., 600.

"No one can be deprived of his property or vested rights, except " by due process of law."

Burns *v.* M. R. C., 8 Saw., 543.
Clarke *v.* Mitchell, 60 Mo., 627.
Pierce *v.* Kitts, 19 W. Va., 564.
White *v.* Crump., 10 W. Va., 583.

" This inhibition upon the state applies to all the instrumentalities " and agencies employed in the administration of its government to " its executive, legislative and judicial departments, etc."

By Field, justice, in Ah Kow *v.* Nunan, 5 Saw., 552.
Ex parte Virginia, 100 U. S., 347.

"Due process of law means in due course of legal proceedings, " including notice and an opportunity to be heard."

Pierce *v.* Kitts, 19 W. Va., 564.
Burns *v.* M. R. C., 8 Sawyer, 543.

"The term law includes a judicial decision as well as a statute."

Butz *v.* Muscatine, 8 Wall., 575.
Chicago *v.* Sheldon, 9 Wall., 50.
City *v.* Lampson, 9 Wall., 477.
Township *v.* Talcott, 19 Wall., 666.

"Upon the state courts, equally with the courts of the union, " rests the obligation to guard, enforce and protect every right " granted or secured by the constitution of the United States and " the laws made in pursuance thereof, whenever those rights are " involved in any suit or proceeding before them, for the judges of " the state courts are required to take an oath to support that con" stitution, and they are bound by it, and the laws of the United " States made in pursuance thereof, and all treaties made under " their authority, as the supreme law of the land, 'anything in the " constitution or laws of any state to the contrary notwithstanding.'

"finding, or upon a finding, which is not justified by or is contrary "to the evidence, cannot be sustained. Silvey *v.* Neary, 59 Cal., "97; Tracy *v.* Craig, 55 Cal., 91; Bradbury *v.* Cronise, 46 Cal., "287; Hill *v.* Den, 54 Cal., 20; Gregory *v.* Nelson, 41 Cal., 286; "Burnett *v.* Stearns, 33 Cal., 468. Such a finding is, therefore, a "a reversible error."

White *v.* Douglass, 71 Cal., 119.

"Where a defendant has answered, the court may grant the "plaintiff any relief consistent with the case made by the com-"plaint, and embraced within the issue.' (Code Civ. Proc., sec. "530.) Here the relief which the court below attempted to grant "the plaintiff, as against the appellant, was neither consistent with "the case made by the complaint nor embraced within the issues "made by the answer.

"In Gregory *v.* Wilson, 41 Cal., 278, it was held that if a judgment "in equity decrees the existence of facts not within any issues "made or tendered by the pleadings, and then pronounces the "judgment of the court upon such facts, such part of the judgment "'is superfluous and nugatory.'

"In Burnett *v.* Stearns, 33 Cal., 474, the supreme court said: "'The province of the court with respect to facts is to determine, "but not to raise the issue.' A judgment for the plaintiff must be "limited by the facts stated in the complaint.

"Where the defendant has answered, the court may, under the "general prayer, grant any relief consistent with the complaint, "with the facts alleged in the complaint; but under the general "prayer, no relief can be granted in equity beyond that which is "authorized by the facts stated in the pleadings. (Carpentier *v.* "Brenham, 50 Cal., 549.)"

Cummings *v.* Cummings, 75 Cal., 441.

"And the finding and judgment to that extent, being contrary to "the facts admitted by the pleadings and outside of the issues made "or tendered, are erroneous. (Gregory *v.* Nelson, 41 Cal., 278.)"

Reinhart *v.* Lugo, 75 Cal., 640.

"It is a cardinal rule in equity pleading that the allegata and "probata must agree. (Greene *v.* Covilland, 10 Cal., 332; Murdock "*v.* Clarke, 59 Cal., 693.)

"A party cannot be allowed to claim relief inconsistent with his "pleading. (Weil *v.* Porter, 77 Mo., 287; Gregory *v.* Nelson, 41

" Cal., 278; Cummings *v.* Cummings, 75 Cal., 434; Carpentier *v.*
" Brenham, 50 Cal., 549; Burnett *v.* Stearns, 33 Cal., 468.)"

Noonan *v.* Nunan, 76 Cal., 49. 22 Pac. R. 284.

We have shown by our petition that this fund is fed by our contributions *out of our salary.* We have shown by the statute of 1878, pp. 9-10, *ante,* that it is fed from no other source. We quote the following to show that salary rights, are rights of property which our courts do respect and enforce.

" These salaries are not fixed at so much per year, but at so much
" per month. * * *

"The board of supervisors are required to levy taxes for city and
" county purposes, but that does not include or imply the power to
" deprive any officer of the municipal government of the number of
" deputies which the law allows him, or to deprive them of the sal-
" aries which the law fixes and requires to be paid in preference to
" any and all other demands whatsoever. (Cashin *v.* Dunn., 58
" Cal., 585.)

"We see no good reason for overruling Cashin *v.* Dunn.

" Salaries are not liabilities against the treasury which rest upon
" any authorization or contract by the board of supervisors, or any
" other officer.

" They are fixed by law and are not subject to the control of such
" officers.

" They are payable out of the general fund and are not limited to
" any particular part of that fund, which the board may choose to
" set apart for their payment. * * *

"They are preferred claims; it is provided by law that in case of
" a deficiency of funds for the payment of such demands they shall
" be registered and paid when there shall be such funds in the or-
" der of their registry. (Consolidation act, 95, 96; Welch *v.* Strother,
" 74 Cal., 416, 417.)

Our salary is "incident to our title to office" and these salary rights have been always enforced as shown by the following:

Smith *v.* Dorsey, 28 Cal., 26, 51, 144.
Dolan *v.* Meyer, 68 N. Y., 274.
McVeany *v.* Mayer, 80 N. Y., 185.
Fitzsimmons *v.* Brooklyn, 7 N. E. R., 787.
Andrews *v.* Portland, 10 At. R., 459.
Nichols *v.* McLean, 101 N. Y., 526.

Andrews *v.* King, 77 Me., 231.
Rule *v.* Tait, 18 Pac. R., 160.
Shaw *v.* Pima, Id., 276.
People *v.* Potter, 63 Cal., 127.
Carroll *v.* Siebenthaler, 37 Cal., 195.

"The thing of which there may be ownership is called property."

§654, civil code.

"There may be ownership of all obligations and rights created or "granted by statute."

§655, civil code.

"No state shall deprive any person of property without due process of law."

14th art.

"The state may acquire property by taxation in the modes authorized by law."

§43, political code.

"The ownership of property is qualified when the time of enjoyment is deferred or limited."

§680, civil code.

"In respect to the time of enjoyment may be present or future."

§688, civil code.

"A future interest entitles the owner to the possession of the "property only at a future period."

§690, civil code.

"Future interests are vested or contingent."

§693.

"A future interest is vested where there is a person in being who "could have a right defeasible or indefeasible to the immediate "possession of the property upon the ceasing of the intermediate "or precedent interest."

§694, civil code.

"A future interest is contingent while the person in whom or the "event upon which it is limited to take effect remains uncertain."

§695, civil code.

"A future interest is not void merely because of the improbability "of the contingency on which it is limited to take effect."

§697, civil code.

"Future interests pass by succession, will or transfer, in the same
" manner as present interests."

§699, civil code.

"No future interest can be defeated or barred by any alienation
" or other act of the owner of the intermediate or precedent interest,
" nor by any destruction of such precedent interest by forfeiture,
" surrender, merger, or otherwise, except as provided by the next
" section, or where a forfeiture is imposed by statute as a penalty
" for the violation thereof.

"No future interest, valid in its creation, is defeated by the de-
" termination of the precedent interest before the happening of the
" contingency on which the future interest is limited to take effect;
" but should such contingency afterwards happen, the future inter-
" est takes effect in the same manner and to the same extent as if
" the precedent interest had continued to the same period."

§§741-742, civil code.

"An obligation is a legal duty by which one person is bound to
" do or not to do a certain thing, and arises from; contract or oper-
" ation of law." §26, code civil procedure. §1427, civil code;—
" and may be enforced in the manner provided by law, or by a civil
" action or proceeding." §1428, civil code.

"A right arising out of an obligation is the property of person
" to whom it is due, and may be transferred as such." §1458, civil
" code.

"A thing in action is right to recover money or other personal
" property in a judicial proceeding." §953, civil code.

"A thing in action arising out of an obligation may be transfer-
" red by the owner. Upon the death of the owner it passes to his
" personal representative," etc. §954, civil code.

"Insurance is a *contract* whereby one undertakes to indemnify
" another against loss, damage, or liability, arising from an un-
" known or contingent event." §2527, civil code.

"The above definition, embracing all the classes of insurance
" mentioned, plainly makes insurance on life a contract of in-
" demnity."

"In harmony with this view, see Ruse *v.* Mut. Benefit Ins. Co., 23
" N. Y., 516; May on Ins., §7."

"An insurance upon life may be made payable on the death of a
" person." §2762, civil code.

"I think (says Mr. Justice Bradley), we are entitled under the
" fourteenth amendment, not only to see that there is some process
" of law, but due process of law, provided by the state law, when a
" citizen is deprived of his property; and that in judging what is
" due process of law, respect must be had to the cause and object
" of the taking, whether under the taxing power, the power of emi-
" nent domain, or the power of assessment for local improvements
" or none of these; and, if found to be suitable or admissible in the
" special case, it will be adjudged to be due process of law, but if
" found to be arbitrary, oppressive and unjust, it may be declared
" to be not due process of law."

Davidson *v.* N. O., 96 U. S , 104.

"A state acts by its legislative, its executive, or judicial authorities.
"It can act in no other way.

"The constitutional provisions, therefore, must mean that no
" agency of the state, or of the officers or agents by whom its power
" are exerted, shall deny to any person within its jurisdiction the
" equal protection of the laws.

"Whoever by virtue of public position under a state government
" deprives another of property, life or liberty, without due process
" of law, or denies or takes away the equal protection of the laws,
" violates the constitutional inhibition, and as he acts in the name
" of and for the state, and is clothed with the state's power, his act
" is that of the state.

"This must be so, or the constitutional prohibition has no
" meaning.

"Then the state has clothed one of its agents with power to annul
" or evade it." * * *

Ex parte Virginia, 100 U. S., 339.
Stauder *v.* W. Va., 100 U. S., 303.
Neale *v.* Delaware, 103 U. S., 370.
Bush *v.* Ky., 107 U. S., 110.
Yick Wo, 118 U. S., 357.
Dent. *v.* W. Va., 9 S. C. R., 234.

**The 14th article takes away the power of the state " to give to A
" the sole right to bake bread, to B the sole right to make hats, to
" C the sole right to sow grain or plow the fields, and thus at their
" discretion to grant to some the means of livelihood and withhold
" it from others."**

By Field, J., in 18 Wall., 139.

The rule declared by the United States supreme court " places " under the same restrictions and subjects to like penalties and " burdens all who sell the articles embraced by its prohibitions, " thus recognizing and preserving the principle of equality among " those engaged in the same business. (Barbier *v.* Connolly, 113 " U. S., 27; Soon Hing *v.* Crowley, Id., 703; M. P. R. Co. *v.* Humes, " 105 U. S., 512, 519.)"

Powell *v.* Penn., 127 U. S., 687.
Deut. *v.* W. Va., 9 S. C. R. (U. S.) 233.

" Due process of law is not confined to judicial proceedings, but " extends to every case which may deprive a citizen of life, liberty, " or property, whether the proceeding be judicial, administrative, " or executive in its nature."

And that learned court thus defines the meaning of " due process " of law," to wit: "It may, however, be stated generally that due " process of law requires an orderly proceeding adapted to the nature " of the case in which the citizen has an opportunity to be heard, " and to defend, protect, and enforce his rights.

"A hearing or an opportunity to be heard is absolutely essential. " We cannot conceive of due process of law without this."

In the celebrated Dartmouth College case, 4 Wheat., 519, Mr. Webster defined "due process of law" as a proceeding " which " proceeds upon inquiry, and renders judgment only after trial."

Chauvin *v.* Valiton, 20 Pac., 661.

" No person who is not of the class for whose benefit the association was authorized can be a beneficiary. Insurance Co. *v.* " Miller, 13 Bush, 489; McClure *v.* Johnson, 56 Iowa, 620; 10 N. " W. Rep., 217; Association *v.* Gouser, 1 N. E. Rep., 11 (Ohio, " Feb. 24, 1885); Associatien *v.* Hoyt, 46 Mich., 473; 9 N. W. " Rep., 497."

Lyon *v.* Rolfe *et al.*, 42 N. W. Rep., 1096.

" The diversion of the funds of the corporation to other objects " than those mentioned in their articles * * * shall be deemed " such frauds as will subject those therein concerned to the penalties." * *

Grayson *v.* Willoughby *et al.*, 42 N. W. Rep. 592.

We have endeavored in pages 9 to 37 , *ante*, to bring to the notice of this court the statutory and case law which we consider applicable to our contention. In our argument we shall refer to the foregoing pages.

Argument.

The federal questions presented by this record are:

Does §13+ of the act of March 4th, 1889, deprive the plaintiff of property without due process of law? or

+ pp 41-2 post.

Violate the obligation of our contract of life insurance?

Has the court below, in going outside the issues and deciding our case on a supposed situation which was not alleged or proved, denied to us the equal protection of the law?

We shall examine these questions in their order.

We claim that our life insurance is a property right.

It has *value.* §§ 451-2, p. 11, *ante*; stat. 1889, p. 12, *ante*; 9 S. C. R., 296, p. 12, *ante.*

It may be *owned.* A person has an insurable interest in his own life. §2763-4, civil code, p. 12, *ante*; nine cases cited, p. 16, *ante*; 94 U. S., 460, and other decisions of this court, pp. 16 to 18, *ante.*

Therefore, IT IS PROPERTY. §§654-5, p. 34, *ante.*

There may be a recovery upon it. §2763-4, C. C., p. 12, *ante.*

Being *property* it is protected by the 14th art.

On the faith of the contract we employed our time and labor, and under Floyd *v.* Blanding, 54 Cal., 45, quoted on p. 20, *ante*, we are entitled to recover.

The interest of the insured was a present interest in a future estate. (See code, section 680-697, p. 34, *ante.*)

" Future interests pass by succession." (§699, p. 35, *ante.*)

" A future interest cannot be defeated by the destruction of the " precedent interest. If the contingency happens after the determination of the precedent interest, the future interest takes effect " in the same manner and to the same extent as if the precedent " interest had continued to the same period." (§§741-2, civil code, " p. 35, *ante.*)

This provision was in force on April 1st, 1878, when our insurance law was passed, and becomes a part of our insurance law.

The laws of the state will be read together (69 Cal., 255.)

There was an obligation between the insurer and the insured §2527, civil code (p. 35, *ante*) calls it a *contract*, it was a right created by statute, see nine cases on p. 16, *ante.* It was recognized and defined by our codes, see §26, and §1428, p. 35, *ante.*

It is property, §§1458, 953-4, p. 35, *ante*. The law has said so.

This claim is supported by several decisions of this court, which we have quoted on pp. 16 to 18, *ante*. It is also supported by the laws of California quoted on pp. 9 to 11, *ante*. We say that a dollar is property, the right to collect or receive a dollar or any number of dollars is a property right, or right of property.

Property interests may be present, future, vested, or contingent. (See code sections quoted on pp. 34-35, *ante*.)

This right is not less or more because the claimant is a policeman or employed in the police service.

We urge that our contention must be decided on the pleadings, and not otherwise. The averment that we contributed out of our salary $2.00 per month, imports that we paid out of *our own money* for our life insurance. This averment stands admitted, and the decision should be within the pleadings and not excrescent or protuberant beyond them.

It is common knowledge that the increase of profit of separate or community property assumes the same character and ownership as the fund out of which the profit came. §162, civil code.

"The incident follows the principal, and not the principal the "incident." §3,540, civil code.

Our petition shows that we were on the police before the police insurance law of 1878 was passed.

Section five of this act (quoted on p. 9, *ante*) continued our salary the same as before the passage of said act.

Our salary was, therefore, continued at $125 per month.

We "contributed" (see §11 on page 10, *ante*) "out of our salary" $2.00 per month for eleven years. (See our petition.) p. 4 of Tr.

Where did this money come from?

Before the act of 1878 (creating our fund) was passed the city charter (§71, quoted on pp. 12-13, *ante*) "required the board of "supervisors to levy the amount of taxes required for the payment "of all demands on the treasury thereof for the ensuing fiscal year.

"At the close of each fiscal year the surplus money of all funds "was to be transferred to the general fund."

Our salary "was fixed by law and required to be paid in preference "to any and all other demands whatsoever."

"They are preferred claims and in case of deficiency of funds, "they shall be registered and paid in the order of their registry."

58 Cal., 585; 74 Cal., 416, quoted on p. 33, *ante*.

Under these stringent laws which precluded any continuous surplus and which consumed the surplus every year, the people were taxed for municipal expenses including the salaries of the police. There was no assessment or taxation for insurance of policemen. The assessment and tax were *for salaries*, and nothing more. The first contributions to our fund (for April, 1878) came out of our salary for April, 1878. The levy for this salary was made by order 1,367, passed June 25th, 1877, nine months *before* our police insurance bill was passed (see pp. 14–15, *ante*).

The taxpayers of San Francisco were not then, and have not since been, taxed for a police life insurance. They were, and since have been, taxed for police and other salaries fixed by law; " preferred " claims on the treasury," which cannot be defeated even by the supervisors appropriating less than the proper amount or refusing to levy a tax.

"They are payable out of the general fund and are not limited to " any particular part of that fund which the board may set apart for " their payment." Welch *v.* Strother, 74 Cal. 416; p. 33, *ante.*

Ward contributed to this fund $6.00 out of his salary (previously fixed by law, and re-enacted in the statute of 1878; see p. 9, *ante*) for the fiscal year beginning July 1st, 1877, and ending June 30th, 1878.

That $6.00, when it became Ward's salary, ceased to be public money, and became a special deposit or contribution to this fund, for the uses and purposes prescribed, and for no other uses or purposes. In each succeeding year he contributed in the same manner $24.00 on the same conditions to this fund.

Please see the tax levies shown on pp. 14 to 16, *ante.*

This money when it was in the pocket of the tax-payer was private money.

It passed from the pocket of the tax-payer into the county treasury.

When raised by taxation for " municipal purposes," it became the public money of the municipality.

There it was designated by the board of supervisors for police salaries. Then it was audited out of the treasury, and paid into this fund at the rate of $2 per month for 405 policemen.

When it lay in the general fund, any particular dollar might have been paid to one person, or another presenting a lawful demand on the general fund. It would then be private money.

When the auditor audited our $2 every month out of the general fund, and the county treasurer paid two particular dollars out of the general fund to the defendant for the insurance prescribed in the act of 1878, that money ceased to be public money of the city and became the private money of this fund. The board of supervisors every year have "designated" this money for the "salary" of the police force, and as such, it has come into the hands of the defendant.

Each month our deceased contributed $2 of his money—his "compensation," his "salary"—to this fund. This fund is a trust fund created by law for the uses and objects stated in the creative act, and it ceases to be applicable to any other purpose. (8 Wheat., 464–495.)

McCauley *v.* Brooks, 16 Cal., 35.
Babcock *v.* Middleton, 20 Cal., 659.
Creighton *v.* Pragg, 21 Cal., 119.
Nev. Bk. *v.* Steinmitz, 64 Cal., 316.
Meyer *v.* Porter, 65 Cal., 69.

Quoted on p. 22 *ante.*

The court below erred in holding it to be a public fund or revenue, subject to public control."

"No person who is not of the class for whose benefit the associa-
" tion was authorized can be a beneficiary. *

"The diversion of the funds to other objects is fraud." (42 N. W. R., 1096–592, p. 37, *ante.*)

The pension act spoilates Ward's estate, and takes his property to pension men who were dismissed from the police force for incompetency within one year *before* the passage of the pension act.

Could there be a more flagrant act of injustice?

This provision is found in §13 of the pension act. This is the section which merges our life insurance fund in the new pension fund.

This is the section which the court below construed against us, which construction we come here to correct, and in order that the matter may be conveniently before this court, we quote the section in full.

§13. "Any police life and health insurance fund, or any fund
" provided by law, heretofore existing in any county, city and
" county, city, or town, for the relief or pensioning of police officers,
" or their life or health insurance, or for the payment of a sum of

" money on their death, shall be merged with, paid into, and constitute a part of the fund created under the provisions of this act; " and no person who has resigned, or been dismissed from said " police department, shall be entitled to any relief from such fund; " provided, that any person who, within one year prior to the passage of this act, has been dismissed from the police department " for incompetency or inefficiency, and which incompetency or inefficiency was caused solely by sickness or disability contracted " or suffered while in service as a member thereof, and who has, " prior to said dismissal, served for twelve or more years, as such " member, shall be entitled to all the benefits of this act."

Statutes of California, 1889, p. 59.

If the pensioning of ex-policemen was provided for elsewhere in the act, it might escape particular notice.

In correcting the decision of the court below this court will construe §13 under the federal constitution.

We claim that:

A. The merger of our fund takes our property, and that this statute operates as an act of confiscation, and is not due process of law.

B. That the deprivation clause which follows the merger clause is an *ex post facto* law, and is pregnant with the spirit of injustice and confiscation.

The legislature knew that there were persons who were *entitled* to relief from our fund. If there were no persons entitled to relief from said fund, why put in this provision?

If there were persons *entitled* to relief from this fund and they are excluded from the enjoyment of this property, and the property is transferred by this act to other persons, such a result is class legislation by which some are deprived of property, and others are made rich by making us poor.

This is contrary to the decision of this court (93 U. S., 30–35), quoted on p. 18, *ante* and violates the 14th article.

Class legislation is prohibited (113 U. S., 27-703; 105 U. S., 512-519 cited on p. 37, *ante*.

C. §13, having merged our fund and disentitled certain persons who were previously entitled to participate in our fund, creates in the next clause a benefit or pension (with our money) for persons who were disentitled under the next previous clause. This is class legislation, and is coupled with the confiscation of our money. The spoliation of our fund for the general public would be unlawful, as held by this court in 103 U. S., 367, and other cases cited on pp. 22–23, *ante*.

The diversion of our fund for the benefit of a class who were not within the beneficiary provision is a violation of our rights as held in 42 N. W. R., 592–1096, quoted on p. 37, *ante*, and violates the 14th article. (See 22 Am R., 674; 35 Am. R., 760; 21 N. E. R., 908; 54 Cal., 45, and other cases quoted on pp. 18 to 21, *ante*.

Why was that provision put into the pension act?

It was to meet not a possible but an actual situation.

Under this provision it could be supposed for illustration that in the month of June, 1888, A and B, police officers, were dropped from the roll of the police department for incompetency or inefficiency.

It could be supposed they had contributed to our fund at the same rate as we had, and a like amount up to that time.

That B withdrew his contribution and received all that he had contributed.

That A could have received his contribution in like manner had he been willing to take it.

That Ward, our deceased, was neither incompetent or inefficient. He kept on performing his duty. That he continued his contributions to our fund, and paid his $2. per month (after A and B were dropped) for eight months from June, 1888, to March, 1889. In March, 1889, Ward died, being a policeman at the time of his death, and this statute of March 4, 1889, despoils his estate and deprives his administrator of the funds to pay for his burial—and the unpaid undertaker is waiting for the result of this proceeding, because Ward provided for his last sickness and funeral expenses by this insurance and not otherwise.

By way of argument we have referred to this provision for the pensioning of ex-policemen who were dismissed from office for incompetency or inefficiency within one year prior to March 4th, 1889, not because Ward or his representative wish to defeat the pensioning of such persons, but because it is unjust and illegal to take our contributions to pension other persons. (42 N. W. R., 592–1096, p. 37, *ante*.)

We are content that ex-policemen should be pensioned, but not with our life insurance money, and we claim that this pension act violates the 14th article in the attempt to take our contributions for our life insurance, and give them to the class of pensioners. We claim that this is class legislation in an invidious sense, and violates the 14th article by depriving us of our property without due process of law. (113 U. S., 27–703 and other cases cited on p. 37, *ante.*)

This court has said: "When we take our seats on the bench, we "are not struck with blindness, and forbidden to know as judges "what we know as men."

There is only one city in this state which had a police life insurance fund.

That one fund is confiscated by this act.

There is only one city in the state in which men who left the police department with perfectly clean hands, had to sue to recover the portion of their salary which was retained for life insurance (see nine cases on p. 16, *ante*).

That city is the one in which our fund is located.

There is only one city in which ex-police officers are entitled to relief from this fund.

That city is the same above indicated.

This statute gives us a hint to look in the same city for persons who have claims on this fund.

Should we take the hint thus given by the statute, and look in the courts of San Francisco, we should find suits in the superior court amounting to $10,000, against this fund *and pending at the time of the passage of this act.*

Should we look at the official action of respondent, we should find he has reserved $10,000 to meet these claims.

This statute gives us the hint to look in the same city for men who were dismissed from the police for incompetency or inefficiency within a year prior to March 4, 1889.

Should we look in San Francisco, we shall find two men whom the description of the statute will exactly fit.

For the sake of this argument, we might call them *A* and *B*.

If all these circumstances respond to the peculiar provisions of §13, of the pension act, we think it proper to argue that this act takes our money and gives it to A and B.

If the donation had been made directly by the statute of Ward's money to A and B, it could hardly be more certain or less clear.

We affirm that there is error in the decision of the court below. It is our duty in this court to put our finger on the error, and to use every fair and reasonable argument to show how we are injured and despoiled by the act of which we complain.

If the characters whom in this argument we have described as A and B do not exist, there are many unnecessary words in section xiii.

The statute presumes they do exist, or it would not have provided for them.

If there be not a number of persons who are entitled to assert claims on our fund, the statute is loaded with superfluous and unmeaning words.

The statute presumes such persons do exist, and the text of §xiii. is sufficient excuse for our reasoning from the probable to the actual.

The purpose of this argument will be served if we show clearly to this court how we have been deprived of our property without due process of law.

We claim that our fund must be administered on equitable principles, and that it cannot be merged by an act of legislative confiscation.

We ask that it be devoted to the purpose for which it was raised, and we deny the right of the legislature to take it from us and give it to others. (103 U. S., 367 and many cases cited on pp. 17 to 23, *ante.*)

The question whether this insurance is or is not assignable, does not arise in this case. We believe the insurance "may pass by transfer, will or succession" under §2,764 of civil code. "Nor can it be doubted she could have assigned the policy." Silvey *v.* Hodgdon, 52 Cal., 365. See code sections on pp. 34–35, *ante.*

It is certain that a testator may control it by his will, as has been done in many cases out of forty or more insurances which have been paid out of this fund since June 1, 1878.

It is common knowledge that with very few exceptions our municipal treasury has been exhausted for a period in every year since 1856.

The annual collection of taxes brings a large amount of money into the treasury in the month of January every year.

In the months of October, November, or December, there usually is a deficiency.

In the months of April, May, and June, 1883, the treasury was empty, and holders of claims were glad to sell at ten per cent discount.

This was in consequence of the decision, 62 Cal., 642, quoted on p. 13, *ante*.

From the creation of our life insurance fund in 1878 to the present time (and previously) these deficiencies have existed, yet it was never attempted to use our fund for any other purpose, even under the pressure of the public gas lights being extinguished for want of municipal funds to pay for their illumination, and public schools about to be closed for want of funds, many teachers being deprived of the salaries they have earned, for lack of funds to pay them.

In each succeeding fiscal year the surplus funds (if any) were merged in the general fund for the next year. (See statute on pp. 12–13, *ante*.)

Our fund has increased from year to year, till $40,000 has accumulated after paying out an equal sum for life insurance and rescisions. (See nine cases on p, 16, *ante*.) In each fiscal year our fund survived the transfer of the surplus, because it was not a public fund or public money, but was a private fund devoted by the statute to pay certain obligations.

The constitution of 1879 requires (please notice 62 Cal., 642, quoted on p. 13, *ante*) "that each year's income and revenue must "pay each year's indebtedness and liability, and no indebtedness "or liability incurred in any one year shall be paid out of the in- "come and revenue of any future year."

The $24 a year, which was contributed by us every year from 1878 to 1889, was raised by taxation for our salary. When it came in by taxation, it was part of the city income for that particular year in which it was collected. When it was allotted to us for salary and paid to our agent (the respondent) for us and we contributed the same to our fund, it was part of the indebtedness for that same year, but it was a paid indebtedness which was balanced against the income of the same year.

This view of our constitution shows that our fund is not public money.

Please see cases cited on pp. 22-23, *ante*.

The court below denied our property right in this fund. (See folio 26, p. 9 of Tr.)

We claim:

" Property is the subject of ownership." (§654, civil code, pp. 12–34, *ante.*)

" There may be ownership of all obligations, and *rights created* " or *granted by statute.*" (§655, civil code, p. 34, *ante.*)

Whether our claim be treated as a contract, *which it is*, or as a right granted by statute; it is a property right because the law says so. It is " the subject of ownership." The result must be the same whichever chain of reasoning is pursued to reach it. Our court (crowded as it is with business) loses sight of the true issue, and says " offices and salaries are not held by contract or grant," etc.

This is true in a proper sense, and applies to prospective legislation, and not to retrospective legislation.

Ward is dead and he certainly is not in this proceeding seeking to hold office against the legislative will.

The administrator of our deceased has no controversy with the legislature about reducing salary. That can be done prospectively but not retrospectively. Our court intimates the limit " unless restricted by the constitution " and (it would seem unconsciously) speedily steps over this salutary limitation.

The four cases cited by the court below (folio 26, p. 9, of tr.) have no reference to salary earned in the past.

We admit their force as to future duties and future salaries, but none of them touch the right of the legislature to recoup a salary already earned.

The deliverance of our court, quoted on p. 33, *ante*, assures us that the officer " cannot be deprived of his salary. It is a preferred " claim superior to all other demands." (58 Cal., 585, and many other cases cited on pp. 33–34, *ante*)

The respondent in this case had the same rights to mandamus to compel the payment to him by the city of our monthly contribution that we had to enforce the payment to us of the other moiety of our salary and the same rights that Cashin, Welch and others (cited on pp. 33–34, *ante*) enforced through our courts.

The money which we contributed to this fund was and is our *property*, our rights in this fund were and are *property rights* and as such they are protected by the federal constitution.

The tax-payers who in 1877–1878, and each following year paid taxes duly levied for police salaries, have no interest in this fund as reversioners, remainder men, or otherwise.

This fund is ours. It belongs to the contributors as held by this court in 93 U. S., 30, cited on p. 18, *ante*, and other decisions, 16 to 18, *ante*.

This fund is ours as held by the judicial power of our state in cases cited on p. 16, *ante*.

It would not have been possible to have raised or created a fund by taxation of the tax-payers of San Francisco for eleven years last past to be given away by the California legislature of 1889.

Is our legislature exercising the taxing power, or eminent domain, or taxation for local improvements? (See remarks of Justice Bradley quoted on p. 36, *ante*.)

" Respect must be had to the cause and object of the taking."

Our fund was raised by taxation for salaries for the past eleven years.

The taxing power cannot be again exerted to get it out of the pockets of the taxpayers.

If this is the taxing power exerted on a certain class of police officers, for the benefit of a certain other class of police officers, the abuse would be so plain as to require no citation of authorities to show its invalidity.

" Taxation must be equal and uniform, and must be vested in the " corporate authorities." (See article xi., §12, constitution of California, 96 U. S., 104, quoted on p. 36, *ante*.)

If the servient class of police officers whose contributions are merged, are taxed by this statute for the benefit of the dominant class created by this section, there is obviously a taking without due process of law within the meaning of the 14th article.

" The state may acquire property by taxation, but must pursue " the mode prescribed by law." (§43, political code, quoted on p. 34, *ante*.)

In this statute there is no observance of the modes prescribed by law for the exercise of the taxing power. It is confiscation undisguised and violates the 14th article.

The taxing power is limited to the public obligations as prescribed by law, abuse of the power, and the hoarding of funds, is carefully guarded against by the annual transfer of surplus funds.

This fund does not belong to the city or the state. It belongs to the contributors, of whom Ward was one.

But our court said " he had a mere expectancy." This is not more true of Ward's insurance, than of any other life insurance.

The codes in 1873 declared certain property rights, some of which are defined in the sections quoted on pp. 34-35, *ante*.

Among these rights are obligations arising from contract, and those created or granted by statute. Both are property. Life insurance, and the rights which spring from it are defined by these codes, and when the legislature of 1878 created our fund the words life insurance in our statute of 1878 meant the same property rights as are defined by our codes where the words "life insurance" are used.

Our court, therefore, erred in holding that our life insurance was a mere expectancy, or any thing different from an ordinary life insurance, as known to the law and the decisions of this court.

An estate may be an estate in expectancy or a future estate, but if the elements of a legal estate are found, the property right whether present or future will be asserted and enforced by the courts and will be protected by the 14th art.

The act of March 4, 1889, impairs the obligation of our contract with respondent, and thereby violates art. i., §10 of the federal constitution.

Life insurance means the same thing in one statute as in another.

"The court will take judicial notice of the true signification of "all English words and phrases and all legal expressions." (§1,875, code civil procedure.)

Our legislature in 1878 used the words "life," "insurance," in two statutes (quoted on pp. 9 and 11, *ante*). These words mean the same in both statutes. "Words are construed according to the approved use of language" (§16, code civil procedure, quoted on p. 10, *ante*).

Life insurance is defined by Mr. Justice Grey to be "the payment "by one of the consideration and the promise of the other to pay "the insurance." (Com. *v*. Wetherbee, 105 Mass., 140.)

"Such contracts are valid and may be enforced (Bacon on life "insurance" (1889), p. 25, and cases thereunder cited).

"Such (insurers) have no power to create a fund for other persons "than classes named." (Id., p. 66, and cases thereunder cited.)

"The American orders carry $1,626,000,000.00 of life insurance." (Id., p. 16.)

Life insurance in our state is older than our first volume of statutes.

It is found in:

Act of April 22, 1850, §40, allowing insurance to be made on the ife of a person absent at sea.

Act of April 26, 1851, to provide for the formation of mutual insurance companies.

Act of May 11, 1854, in respect to insurance of lives for the benefit of married women.

Act of April 2, 1866, p. 752 "to provide, etç., for the insurance "of life and health," etc.

Act of April 4, 1870, p. 859, to provide for the official valuation of life insurance policies.

Act of February 2, 1872, p. 59, to regulate the forfeiture of life insurance.

The codes; January 1, 1873, see §§2,762–6, civil code, also code sections quoted on pp. 10, 11 and 34, *ante.*

Act of March 30, 1874, §§449 to 451, added to the civil code.

Act of April 1, 1878, amends §§450 to 452 of civil code. (See pp. 10 and 11, *ante.*)

Act of April 1, 1878, p. 879. Our life insurance law, quoted on pp. 9 and 16, *ante.*

Act of April 26, 1880, p. 517, to amend sections relating to life insurance.

Act of March 23, 1885, adding §451, to the civil code.

Act of February 25, 1889, p. 35, relating to the valuation of life insurance policies (quoted on p. 12, *ante*).

Life insurance as defined above by Justice Grey is the same contract which is meant and intended when the same words are used in the above statutes.

If it be otherwise, written laws and written constitutions have ceased to bear from age to age the guaranties of freedom, which we prize above all price.

Our court by its decision takes issue with this high tribunal (118 U. S., 356) "That we should have 'a government of laws, and not " 'of men.' "

It makes the life insurance of our deceased policeman mean something different from the life insurance of an ordinary person.

We say that this is error.

Life insurance in our act of 1878 means the same as the same words in 9 S. C. R., 296, quoted on pp. 16–17, and other cases quoted on pp. 17 and 18, *ante*.

If this reasoning is correct, we have property rights which can be

asserted and must be respected in order that our government "may "be of laws, and not of men." (118 U. S., 356.)

We are entitled to subject §13 by which we are *despoiled* to the severest examination. Please notice the language in the last four lines on p. 41, *ante*.

Our fund is the object of confiscation. Our court deems the aim unerring, and the devastation accomplished and complete.

But please read on—"*or any fund for the relief or pensioning of* "*police officers*," etc. There were no such funds existing. The use of these words was to give an appearance of general legislation to an act of confiscation whose chief object was the swallowing of our fund.

We are not beggars asking for relief, or unproved claimants clamoring for a pension to which we are doubtfully entitled.

We assert rights of property which cannot be denied without disturbing the safety of every one who has property enough to excite the cupidity of any other person.

"If this can be done the legislature may take the property of the "citizen without any legal process. The legislature has no power "to do so." Brady *v.* King, 53 Cal., 45; Peop. *v.* Lynch, 51 Cal., 15; Kelly *v.* Luning, 76 Cal., 311, 79 Cal., 90.

Our civil code, §2527, see p. 35, *ante*, calls the obligation of the the insurer a *contract*. It is a contract because the law says so.

This court has said "a contract is an agreement to do or not to "do a certain thing." (Cases cited on p. 23, *ante*.)

"Legislative enactments become contracts under this provision. (95 U. S., 114, p. 23, *ante*.)

Our supreme court has repeatedly held certain statutes to be contracts.

Please see Floyd *v.* Blanding, 54 Cal., 45, quoted on pp. 20-21, *ante*, in which many decisions of this court are reviewed.

There are six California decisions quoted on p. 22, *ante*, which fully sustain our claim that "where the state has authorized a municipal corporation to contract and to exercise the power of taxation "to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." (Wolf *v.* N. O., 103 U. S., 367, pp. 22-23, *ante*.)

This is our exact situation. Our contract with respondent is found in the statutes of 1878 and §451, of civil code, pp. 10-11, *ante*.

We have shown the annual tax levies from 1877 to 1888, pp. 14 to 16, *ante*.

We have shown that our fund has accumulated $40,000 in eleven years after paying all death benefits and all rescissions to the living, say $60,000; and that we have contributed thereto the sum of $2 for every month of said eleven years.

That said fund is not available for any purpose other than those for which it has been raised. (Cases cited on pp. 22–23, *ante.*)

That the contributors have legal rights in said fund as evidenced in the nine cases cited on p. 16, *ante*.

That our $40,000 has survived the annual transfer of surplus public funds (see statute on p. 12, *ante*) because it is not a public fund, but a special private fund raised by contributions from our salaries, and from no other source.

That this court has repeatedly held that the contributors to such a fund have rights of property, "the fund belongs in one sense to "the insured." (See cases cited on pp. 16 to 18, *ante.*)

The reasoning in the 76 N. C., 103; 14 W. Va., 411, and 21 N. E. R., 908, quoted on pp. 18 to 20, *ante*, strongly support our contention that this fund cannot be diverted.

We urge that the respondent should be held to meet our claim because the validity of our contract cannot be impaired by the repeal of our insurance law. 8 Wheat., 485, cited on p. 6, *ante* ; Ping *v.* U. S., 9 S. C R., 631, 79 Cal., 45.

There are numerous decisions on pp. 21 to 29, *ante*, on which we rely to support our claims that the state cannot retain our contributions, dissolve our insurance, and give our fund for other purposes, no matter how meritorious, than those for which it was raised.

For the $2.00 per month which we paid respondent we could have procured a safe insurance for $1,000 in a solvent company.

The state in its wisdom set up the respondent as our insurer. He consented to act as such. We paid him our money, and every element of a contract is present in our case.

Our claim is not against the state or municipal treasury. We do not seek to wield the arm of the taxing power to raise this money.

It has been raised by taxation for the last eleven years, and the respondent has the money.

Our claim is against this fund only. In case of deficiency of funds we are entitled to "a demand which shall be registered and paid in "the order of its registry." (See §12 of act of 1878, p. 10, *ante.*)

We have no claim over against the city.

In looking for the truth every ray of light is valuable.

Our insurance act of 1878 (p. 10, *ante*) provided for a forfeiture of *our claim* on our fund, upon certain conditions prescribed.

We do not understand how a man can forfeit a claim, if he has no claim to forfeit. The judicial power of our state has decided (and final judgment on appeal was given in favor of Alfred Clarke, administrator of the estate of Joseph Clark, deceased, quoted on p. 16, *ante*) *that contributors to our fund have a legal right to the return of their contributions.* This court has held (93 U. S., 30–35; p. 18, *ante*) that a similar fund *belongs* in one sense to the insured.

"The only grounds upon which the correctness of this interpretation "may be doubted is that the words 'penalty,' 'liability,' and 'for"'feiture' do not apply to crimes, and the punishments therefor, "such as we are now considering.

"We cannot assent to this (says Lamar, justice). These words "have been used by the great masters of crown law and elementary "writers as synonymous with the word punishment in connection "with crimes of the highest grade."

U. S. *v.* Reisinger, 9 S. C. R., 101.

We did not incur the forfeiture.

If we had forfeited our *claim*, the forfeiture would be enforced and adjudged by the judicial power (Ieck *v.* Anderson, 57 Cal., 251), and we could have had our day in court on the question of our guilt.

To remove from office or to forfeit a claim for cause is to punish for crime (penal code, §§15, 176, 681, 661. Boyd *v.* U. S , 116 U. S., 635–8).

It is manifest that before the 4th of March, 1889, we had property rights in our fund springing from the text of the police insurance law of 1878 (quoted on pp. 10, 11, *ante*).

Our court admits this to be true, for the opinion says (see folio 26, p. 9, of tr.): "Had he died while the law directed such payment, "a different question would have been presented."

Yet in the face of this admitted right, our court sustains a law which confiscates our property, extinguishes our right, and crushes *a claim* which previously was guarded by the judicial power.

In this manner the legislature, by the pension act of 1889, takes our property without compensation or due process of law, and denies to us the equal protection of the law.

Our court errs in sustaining this act of confiscation.

This court has taught us that the repeal of a statute does not affect rights acquired under it (8 Wheat., 485,) and as if deprecating a contrary construction (which must have been brought to its notice) says "*of this doctrine there can be no question in this court.*" Chae C. Ping *v.* U. S., 9 S. C. R., 631.

This grand decision inspires us with confidence to urge our claim before this high tribunal. This court accepts as conclusive the interpretation given by the state judiciary to state statutes where no question of federal law is involved.

Our judiciary has held (see p. 16, *ante*) that the contributors have rights in our fund. Our supreme court has not reversed that decision. The question was not before it.

Our case went against us on the repeal of our insurance law, and on this question there is a direct opposition between this court and our court below.

We cannot reconcile the deliverance of our court above quoted with the rule concerning which "there can be no question in this court."

The court below has denied to us the equal protection of the law.

"A state acts by its * judicial authorities. * Whoever by "virtue of public position under a state government deprives "another of property, or denies or takes away the equal protection "of the laws, violates the inhibition. His act is that of the state." (100 U. S., 339, p. 36, *ante.*)

"Due process of law proceeds upon enquiry and renders judg-"ment only after trial." (20 Pac., 661, p. 37, *ante*; 19 W. Va., 564, p. 29, *ante.*)

"A judgment should not declare the existence of facts which are "not within the issues made or tendered by the pleadings, nor "should it declare the judgment of the court upon such facts. * "Any finding or judgment of the court repugnant to the facts ad-"mitted by the pleadings IS ERRONEOUS." (13 authorities, pp. 30 to 32, *ante.*)

Stripping this case of the imported elements with which it is beclouded, we ask this court to look at our petition, or the abbreviation on pp. 3–4, *ante,* or on p. 55, *post,* and in the light of the facts stated in the petition, examine the deliverance of our court (quoted in error *eleven,* p. 8, *ante*) " the act of March 4, 1889, is not obnoxious to the" 14th article, and we are confident that the error of our court will be apparent.

" Our pleadings show:

" That we *contributed* out of *our salary* to this insurance fund two " dollars a month for eleven years, total $264.

" That there *is due* to petitioner the sum of $1,000 payable out of " said fund by respondent. That it was and is the duty of respon- " dent to pay said $1,000.

" Demand by petitioner.

" Refusal by respondent on the ground that §13, of act of March " 4, 1889, excuses payment.

" The possession of $40,000 by respondent applicable to pay this " just claim." (Please see assignment of errors, folios 28 to 30, pp. " 10 to 11 of transcript, or pp. 3 and 4, *ante.*)

" For want of denial these averments became *admitted facts in the* " *case,* and any finding or judgment in the case repugnant to these " facts IS ERRONEOUS." (41 Cal., 286, and 12 other decisions, pp. 30 to 32, *ante.*)

Our court did not decide our case on these averments. It disregarded these averments and said our fund was public money.

There was no averment that our fund was public money.

Our averments, — " the admitted facts in the case,"— read in connection with the statute (on pp. 9–10, *ante*) show a private fund raised by *contributions out of our salary* for the benefit of the contributors *according to terms* prescribed in the act.

Our averments show *a property right* in our fund.

These averments are *conclusive* on this hearing, because *they are the admitted facts* in our case.

The finding that this fund was public money is repugnant to the pleadings and *is error.*

We had no day in court or hearing on the question, *is our fund public money?*

If we had been heard we could have shown that it is not.

We could have shown that it belongs to the contributors as held by this court (in 93 U. S., 30, and other cases quoted on pp. 16 to 18, *ante*) as held by our superior court (in 9 cases cited on p. 16, *ante*).

We could have shown by the cases quoted on pp. 22–23, *ante,* that our fund had passed from legislative control.

We were not heard upon this question. The court did not " pro- " ceed upon enquiry and render judgment only after trial."

In refusing us *our day in court* or hearing on this question, our court has *denied* to us the equal protection of the law, and this is the act of the state (100 U. S., 339, *supra*) and the 14th article *is violated*.

Should a navigator in his first calculation slip into an error, such error (if undiscovered) will derange every evolution which rests upon it, and the wreck will monument the error.

Thus our court having erred in looking for facts outside the pleadings falls into an erroneous finding, and this erroneous finding creeps into every deduction and results in final and fatal error.

The powers of the state (almost omnipotent) are limited only by the federal constitution which is *always omnipotent*.

When the state said " there may be ownership of all obligations " and of rights created or granted by statute (§655) the thing of " which there may be ownership is called property" (§654, p. 34, *ante*), these property rights received the protection of the federal constitution.

That protection cannot now be withdrawn or denied by the state.

What power does the state exert in confiscating our insurance fund?

Is it the power of taxation?

This power has already been exercised twelve times in getting this money out of the pockets of the taxpayers (see taxing orders shown on pp. 14–16, *ante*). It cannot be exercised as to the taxpayers without giving them a hearing. (Peop. *v.* Pittsburg, 67 Cal. 625.)

The act of 1889 gives them no hearing.

Ir gives Ward's estate no hearing. It gives the deprived class the cotenants of our confiscation no hearing, (Please see §13 on pp. 41–2, *ante.*)

Having been raised by taxation from the taxpayers for a specific purpose and appropriated for that purpose it cannot be diverted under the decisions we have shown (103 U. S., 367 and others) on pp. 22–23, *ante*.

Is this the power of eminent domain?

The statute shows no case or occasion for the exercise of this power, and no observance of the indispensable procedure.

Is it the power of local taxation for public improvements?

No such situation can be discovered in this case.

It is manifest from the opinion that our court attributed the statute of March 4, 1889, to the exercise of the police power, and in the opinion it is stated that the legislature has all power over such officers, "*unless restricted by the constitution.*" This deliverance of our court states the law correctly.

We maintain that our pleadings show a property right in our fund.

That the decisions of this court (as applied to our pleadings) show a property right "capable of instant and present valuation." (9 S. C. R., 296; pp. 16–17, *ante.*)

Of this right we have been deprived. *First*, by our state legislature; *second*, by the court below.

The police power is limited, as our court properly says, by the "restrictions of the constitution."

If our wages, salary, and compensation, are property rights, as held by our court in 58 Cal., 585, and cases cited on p. 33, *ante*, then the restrictions of the constitution do apply to such rights, and if the state courts fail to correctly apply the provisions of the constitutions securing such rights, this court will not fail to apply the provisions of our federal constitution, by which such rights are protected. (111 U. S., 625, p. 30, *ante.*)

Why should a dollar raised by taxation from the taxpayer by the taxing power, and appropriated and paid as a part of the salary of a policeman, be further removed from the protection of the constitution, than if it was paid to a colored janitor or a chinese laundryman? The question in this court does not depend on the amount involved, but on the question, "Has petitioner on the pleadings a property right or right of property?" If there is a property right, no matter how small, it must be respected; while, on the other hand, if we have no property right, we must go hence without relief.

In order to make more clear our conception of the errors of which we complain we have set in parallel columns the propositions which we affirm and deny as follows:

ERRORS.	OUR ANTITHESES.
One. "This contention goes upon the theory (Supreme court Cal., (case at bar) 22 Pac. Rep., 192, p. 9 of Tr.) "that the deceased had a vested property right in the $1,000 of public money which the statute had at one time directed to be paid	1. "We claim that the issues in this contention should be determined from the pleadings, and we rely on the (13) California cases cited on pp. 30 to 32 *ante.* The pleadings show that we did *not* so contend. The 13 cases show that the decision of our court is error." 2. "A contract of life insurance is as well-known to the law as any other contract, the averments of our petition (abbreviated on p. 3 *ante*) show that we were insured in a fund raised by us and our co-tenants '*by*

Errors.	*Our Antitheses.*
"to his legal representative "on the death (of Ward)."	"*contributions out of our salaries,* which fund is ample to "pay our claims. 3. "The deceased never claimed a vested property "right in the sum of $1,000." 4. "No ingenuity can discover such an averment in "our petition."
"Our court assumed that "our fund is public money, "and on this assumption "decided against us."	5. "The petition states that we contributed out of "our salary to this fund, and other facts which show "that this fund is not public money." 6. "The statistics quoted by us on pp. 9-10, 12-15, "*ante,* show that this fund is raised by contributions "from police salaries, and from no other source." 7. "The taxing orders quoted on pp. 14-15, *ante,* "and the disbursing orders, p. 15, *ante,* show that this "money was raised by taxation for police salaries, appropriated by the supervisors as police salaries, drawn "out of the treasury as police salaries, paid to respondent as police salaries, and is held by him subject to the "legal rights of the contributors." 8. "The decisions of our superior court shown on p. "16, *ante,* show that the contributors had legal rights in "this fund." 9. "The petition shows that respondent 'does not "deny that our deceased was insured in said fund.'" 10. "The finding of our court that this fund is 'public money' is not warranted by the pleadings, is not "sustained by any proof, and being outside the issues is "erroneous, as shown by the decisions cited on pp. 30 to "32 *ante.*" 11. "This finding deprives us of our property without due process of law, because we have had no day in "court or judicial hearing on the question—*Is our fund* "*public money* ?"
Two. "Ward had a mere "expectancy which could "have none of the elements "of a vested right until the "contingency contemplated by the statute had "happened."	12. "The complainants are entitled to the surrender "value of their policies." Brewer, j., 37 Fed., 530, p. 18, *ante.* 13. "The value was easy of calculation." "Every person's interest in life insurance is capable of "instant and present valuation." Carr *v.* Hamilton, 9 S. C. R., (U. S) 296, p. 16-17, *ante.* 14. "The insured has an equitable right to have the "amount of his premium restored to him." N. Y. *v.* Statham, 93 U. S., 34, pp. 17-18, *ante.* 15. "Upon the death of any member of said force there "shall be paid out of said fund $1000." Statute 1878, p. 10, *ante.*

16. "The insured shall be entitled to recover of the "insurer a surrender value."
Statute 1878, p. 11, *ante.*

17. "The net value of the policy." (Then the insurance has a value.)
Statute 1878, §452, p. 11, *ante.*

18. "There may be ownership of all obligation rights "created or granted by statute."
Civil Code, §655, p. 34 *ante.*

19. "The valuation of all policies."
Statute 1889, p. 12, *ante.*

20. "An insurance may pass by succession, successor "may recover."
§2764, Civil Code, p. 12, *ante.*

21. "Every person has an insurable interest in his "own life."
§2763, Civil Code, p. 12, *ante.*

22. "The superior court has decided that the insured "have legal rights in our fund."
Cases cited, p. 16, *ante.*

23. "A man has an insurable in his own life."
C. M. L. I. Co. *v.* Shaeffer, 94 U. S., 460, p. 17 *ante.*

24. "The insured is entitled to the equitable value "of his policy. * * *It belongs in one sense to the insured.* " * * It would be taking from the insured *his property.*"
N. Y. L. I. Co. *v.* Statham, 93 U. S., 30; pp. 17-18, *ante.*

25. "The words life insurance in our act of 1878, p. "879, see p. 9, *ante,* have the same meaning as when "used in secs. 2763-4 and 451-2 of the civil code and "elsewhere in the statutes, and in the decisions of this "court, cited on pp. 17-18, *ante.*"

26. "Words and phrases must be construed according "to their meaning. See code, sections 16, 1858 and "1645, cited on p. 10, *ante.*"

27. "The laws of the state will be read together."
Lux *v.* Haggin, 69 Cal., 255.

Three. "Our court erred "in holding that when "Ward died there was no "statute which gave his "death any significance."

28. "This court has held that 'the repeal of a statute "'does not affect rights acquired under it.' Of this doc"trine there can be no question in this court."
Ping *v.* U. S., 9 S. C. R., 631.
Society *v.* New Haven, 8 Wheat, 485.
Oakland *v.* Barstoro, 79 Cal., 45; 21 Pac. R., 544.

Four. "This pension "act operates as class legislation, discriminating "against Ward and those "in his class, and takes "their wages, salaries and "compensation, including "Ward's contribution of "$264, for the benefit of "pensioners including persons dismissed from the "police force for incompetence or inefficiency "within one year prior to "March 4, 1889." (See sec. 13, quoted on pp. 41-2 *ante.*

29. "Ward's life insurance had *an instant and present* "*valuation.*"

Carr *v.* Hamilton, 9 S. C. R., 296; p. 16 *ante.*

30. "It had *a surrender value.*"

Sec. 451, Civil Code, p. 11 *ante.*

31. "It was capable *of ownership.* It was *property.*"

Sec. 654, Civil Code, p. 12 and 34 *ante.*

32. "The premium of $264 contributed by him out of "his salary *belonged in one sense* to him."

N. Y. *v.* Statham, 93 U. S., 30-35; p. 18 *ante.*

Ingersoll *v* Mo., etc., 37 Fed., 530; p. 18 *ante.*

33. "Taking this property by a statute violates art. "xiv. and sec. 10 of art. i. of the federal constitution.

Hutson *v.* Woodbridge, 79 Cal., 90; 21 Pac. R., 435.

"Every blow * * is caught upon the broad shield "of our blessed constitution and our equal laws. Against "such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the 'nation."

Ah Kow *v.* Nunan, 5 Saw., 552.

34. "No charges or burdens shall be laid upon him "which are not equally borne by others."

Barbier *v.* Connolly, 113 U. S., 27.

"Class legislation discriminating against some and "favoring others is prohibited." *Id.*

Yick Wo *v.* Hopkins, 118 U. S., 356.

"Our 'substantial right' to our salary 'is invaded.'" *Id.*

35. "Here is 'invidious distinction against us and "those in our class.'" (113 U. S., 703) 'Our property is "taken and the property of others is increased by what "is taken from us." (93 U. S., 305, p. 18 *ante.*)

36. "We are not 'treated alike' under the same condition."

"This is 'discriminating legislation in an invidious "sense.'" (113 U. S., 703.)

37. "And under pretense of regulation our 'right is "injuriously affected and subverted.'" 118 U. S. R., 356.

38. "It practically makes unjust and illegal discrimination between persons in similar circumstances, "material to their rights. The denial of equal justice is "still within the prohibition of the constitution."

Yick Wo *v.* Hopkins, 118 U. S. R., 356.

Five. "Did not interfere with any vested "right."

39. "In case any police officer shall resign from bad "health or bodily infirmity, there shall be paid to him "from said fund the amount of the principal sum which "he shall have contributed thereto."

Stat. 1878, sec. 11, pp. 9-10 *ante.* (See nine cases on p. 16, *ante.*)

	With reverence we say that Ward thus resigned, and there can be no doubt as to the truth of the cause, because THE OMNIPOTENT held the pen.
Six. "Any police life "and health insurance "fund shall be merged "with, paid into, and con-"stitute a part of the fund "created under this act."	40. "The pension act provides no pension or any re-"lief whatever for Ward." 41. The pleadings admit that Ward contributed out "of his salary $264 (before the passage of the pension "act) as premiums on his life insurance." 42. "As construed by the court below the pension "act confiscates this contribution." 43. "*This is error* under 94 U. S., 460, p. 17 *ante;* 93 "U. S., 362, p. 18 *ante;* 9 S. C. R., 296, p. 17 *ante.*
Seven. "Did not inter-"fere with any vested "right."	44. "The laws of the state will be read together." Lux *v.* Haggin, 69 Cal., 255.
Five. See error, *supra,* and antithesis.	45. "The insured 'shall be entitled to recover of the "insurer a surrender value, etc." Sec. 451, Civil Code, April 1, 1878, p. 11 *ante.*
Eight. "Our court dis-"missed our petition."	46. "The petition showed that Ward was insured at "the time of his death, and that respondent does not "deny that fact."
Nine. "It is settled "that salaried public of-"fices are not held by con-"tract or by grant. The "legislature has full con-"trol over them. *This is "true but we are not holding "office or salary against the "legislative will.*"	47. "We are asserting a right to a salary already "earned. We contributed $2 per month out of our sal-"ary for eleven years with the approval of the legis-"lature. The respondent admits that he has our money." 48. "These salary rights are always enforced by our "courts as shown in Welch *v.* Strother, 74 Cal., 416, "and other cases cited on pp. 33-34, *ante.*" 49. "By the death of Ward his right to recover his "contribution or premiums was changed into the right "of his legal representative to receive the insurance on his "life."
Ten. "The legislature "has power to extinguish "the office, to reduce the "salary and increase the "duties, but *not to confis-"cate a salary already earn-"ed or an insurance already "fully paid for.*"	50. "If our auditor had refused to audit our $2 per "month in favor of respondent, our courts would have "issued mandates. Our contributions for the last eleven "years to this fund are as far removed from legislative "control as the other portion of our salaries." Wolf *v.* N. O., 103 U. S., 367, and many cases cited on pp. 22-23 *ante.*
Eleven. "The act of "March 4, 1889, did not "interfere with any vested "right, and is not obnox-"ious to the constitutional "principle invoked by pe-"titioner."	51. "Our court overlooks the provision which was "part of the original contract 'in case any officer shall "resign from bad health or bodily infirmity, there shall "be paid to him from said fund the amount of the prin-"cipal sum which he shall have contributed thereto.'" Stat. 1878, sec. 11, see p. 10 *ante.*

	52. "The insured shall be entitled to recover of the "insurer a surrender value." Sec. 451, Civil Code, p. 11 *ante*.
	53. "The contributions belong to the contributor." N. Y. *v.* Statham, 93 U. S., 30–35, p. 18 *ante*.
Twelve. "Our court "erred in denying our "prayer."	54. "Equity would not order full payment if the "pleading showed heavy losses. Our pleading does not "show any losses, and the accumulation of $40,000 in "eleven years shows great financial gain and increase in "our fund."
	55. "Our civil code, sec. 2764, p. 12 *ante*, provides "the successor 'may recover whatever the insured might "have recovered.'"
Thirteen. "Said act is "not obnoxious to the 14th "article."	56. "We submit that our insurance being a property "right, is protected from confiscation by art. xiv., and "having the elements of a contract, it is protected by "art i., sec. 10, of our federal constitution."

Conclusion.

Our court in its opinion (folio 25, p. 8, of tr.) seems to ignore the distinction made by our act of 1878 between the old police of whom Ward was one and the new police. (See stat. 1878, p. 879 *et seq.*) The salaries of the old police were continued by this statute at the previous rate, which was $125 per month. The previous incumbents were to be known as the "old police," the new officers as the "new police."

What might be the rights of a "new policeman" under the act of 1878 was not in issue on the pleadings in the court below. The pleadings show that Ward was an old policeman. His insurance came out of a contribution out of his salary previously fixed by law, and said law was continued in force by the act of 1878, p. 879. We claim that these facts show a property right which is protected by the 14th article.

We have shown by statutes and decisions of our state that we assert rights of property which cannot be denied while property is the subject of ownership, or law and courts administer the rights of men.

On this foundation we have built a pyramid of statute and decision which is crowned with the perpetual effulgence which gathers round the solemn deliverances of this august tribunal, and we confidently wait the solution of the questions, with becoming modesty, we have attempted to present.

We respectfully submit that the decision complained of ought to be reversed and that proper allowance should be made for the costs of this proceeding.

ALFRED CLARKE,
JAMES A. JOHNSON,
Counsel for plaintiff in error.

San Francisco,
November 20th, 1889.

This cause is submitted for decision on printed arguments or briefs to be filed on or before Nov. 30, 1889, as stipulated in writing Oct. 1889

FILED,
NOV 30 1889
JAMES H. McKENNEY,
CLERK.

No. 1260.

October Term, 1889.

SUPREME COURT

—OF THE—

UNITED STATES.

JAMES C. PENNIE, Administrator of the Estate of Edward A. Ward, deceased,
Plaintiff in Error,

vs.

C. REIS, Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DAVIS LOUDERBACK,
Counsel for Defendant in Error.

Filed .... day of November, 1889.

.... Clerk.

By .... Deputy Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1889.

No. 1260.

JAMES C. PENNIE, ADMINISTRATOR OF THE ESTATE OF EDWARD A. WARD, DECEASED,
Plaintiff in Error.

vs.

C. REIS, TREASURER, ETC.,
Defendant in Error.

Error to the Supreme Court of the State of California.

Brief on behalf of Defendant in Error.

Statement of the Case.

In an original proceeding in the Supreme Court of the State of California, upon the petition or ~~appeal~~ affidavit of the Plaintiff, the Supreme Court of California issued an alternative writ of mandate which was served on C. Reis, the Treasurer of the City and County of San Francisco, as Treasurer of the Police Life and Health Insurance Fund of the City and County of San Francisco, to pay the petitioner [the plaintiff here in error] the sum of one thousand dollars, or show cause at a specified time why he had not done so.

C. Reis, the Treasurer, demurred that the petitioner's affidavit did not state facts sufficient to constitute a cause of action, or to entitle the petitioner to any writ of mandate, or any relief whatever.

The matter, after oral argument, was submitted on printed briefs, and the Supreme Court of California denied the prayer of petitioner, and dismissed the writ.

The Statute of the State of California, entitled "An Act to enable the Board of Supervisors of the City and County of San Francisco to increase the police force of said city and county, and provide for the appointment, regulation and payment thereof," approved April 1, 1878, (see Statutes of California for 1877–8, p. 879), increases the police force to four hundred, provides for a Board of Police Commissioners, and for the government of the Police Force.

The following sections of that statute relate to the subject-matter of this litigation:

Sec. 2. The compensation of the two hundred and fifty (250) police officers provided for by this Act, or such part thereof as said Board of Supervisors shall allow, shall not exceed one hundred and two ($102) dollars per month each, and the compensation of the police officers in office at the time of the passage of this Act shall continue at the amount or rate established by the Act or Acts under which they have been appointed, until the first day of January, A. D. eighteen hundred and seventy-nine, when and upon which day their pay shall be graded and fixed by the Board of Commissioners provided to be appointed by this Act. The police officers now in office shall be known as the "old police," and those appointed by virtue of this Act shall be known as the "new police." Police officers hereafter appointed to fill vacancies upon the "old police" shall receive the same pay with the "new police," subject to the condition that the Treasurer of said city and county shall retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be know as "The Police Life and Health Insurance Fund," which said fund shall be administered as is provided in sections nine to thirteen inclusive, of this Act.

Sec. 9. That the Mayor, Auditor and Treasurer of the City and County of San Francisco, shall constitute a Board, known as "The Police Life and Health Insurance Board."

Sec. 10. The said Board shall, from time to time, as in their judgment may be best, invest the moneys of "The Police Life and Health Insurance Fund" in such of the following securities as shall seem the most safe and profitable, namely: the bonds of the City and County of San Francisco; the bonds of the State of California; the bonds of the United States of America, and the securities shall be held by said Treasurer, subject to the order of said Board, and the said Treasurer shall have no power to deposit, pledge, or in any way part with the possession of said securities, or the evidence thereof, except on the order of said Board.

Sec. 11. Upon the death of any member of the said Police Force, after the first day of June, eighteen hundred and seventy eight, there shall be paid by the Treasurer, out of said "Life and Health Insurance Fund," to the legal representative of said police officer, the sum of one thousand dollars. In case any officer shall resign, from bad health, or bodily infirmity, there shall be paid to him, from said fund, the amount of the principal sum which he shall have contributed thereto. In case of dismissal of any police officer for mere incompetency, not coupled with any offense against the laws of the State, such officer shall be paid from said fund such amount as the Board may award, not exceeding one-half of the sum he may have contributed to said fund. Any officer dismissed for gross neglect or violation of duty, or upon conviction of any misdemeanor or felony, shall forfeit all claim upon said fund.

Sec. 12. In case such fund shall not be sufficient to pay the demand upon it, such demand shall be registered and paid in the order of its registry out of the funds as received.

Sec. 13. The said Mayor, Auditor and Treasurer shall receive no compensation for their services as members of said Board, nor shall the said Treasurer receive any compensation as treasurer and custodian of said funds.

Edward A. Ward, a police officer, died on March 13, 1889, having been a member of said Police Department since September 24, 1869. The Treasurer had retained two dollars each month from his pay as provided in the statute from April 1, 1878, to March, 1889.

Nine days before the death of Ward, that is on March 4, 1889, the Governor of the State of California approved an act of the Legislature of the State of California, entitled " An Act to create a

Police Relief, Health, and Life Insurance and Pension Fund in the several counties, cities and counties, cities and towns of the State." See Statutes of California for 1889, p. 56.

This act creates (section 1) a board of trustees of the Police Relief and Pension Fund of the Police Department in each county, city and county, city or town to be known as the Board of Police Pension Fund Commissioners, and provides (section 2) for the organization of the board, etc., its administration of the fund, etc., (section 3) pensions for officers over 60 years of age who have been in service over 20 years, and to those (section 4) who become physically disabled in the performance of their duties, and (section 6) to the widows or children of those who loose their lives in the discharge of their duties, and (section 7) the payment of a certain sum of money to the widow or children, etc., of those who die from natural causes after ten and less than twenty years' service, and regulates (section 5) the evidence of disability and provides for re-examination as to the disability, and that retired officers shall report to Chief of Police at certain stated periods, and perform duty under certain circumstances, and how (section 9) pensions may be forfeited by misconduct and regulates (section 10) the meetings of the board and prescribes the duties as to the fund and empowers it (section 11) to compel the appearance of witnesses, appoint secretary, and to make needful rules and regulations for its guidance and requires reports of expenditures, etc., and provides that the surplus over what is necessary to pay pensions shall at stated times be turned into the general fund of the city and county of San Francisco.

The following are sections of the act necessary to the decision of this case.

Sec. 12. The Board of Supervisors, or other governing authority, of any county, city and county, city or town shall, for the purposes of said "Police Relief and Pension Fund" hereinbefore mentioned, direct the payment annually, and when the tax levy is made, into said Fund of the following moneys:

First—Not less than five nor more than ten per centum of all moneys collected and received from licenses for the keeping of places wherein spirituous, malt, or other intoxicating liquors are sold.

Second—One-half of all moneys received from taxes or from licenses upon dogs.

Third—All moneys received from fines imposed upon the members of the Police Force of said county, city and county, city or town, for violation of the rules and regulations of the Police Department.

Fourth—All proceeds of sales of unclaimed property.

Fifth—Not less than one-fourth nor more than one-half of all moneys received from licenses from pawnbrokers, billiard-hall keepers, second hand dealers and junk stores.

Sixth—All moneys received from fines for carrying concealed weapons.

Seventh—Twenty-five per centum of all fines collected in money for violation of county, city and county, city or town ordinances.

Eighth—All rewards given or paid to members of such Police Force, except such as shall be excepted by the Chief of Police.

Ninth—The Treasurer of any county, city and county, city or town shall retain from the pay of each member of Police Department the sum of two dollars per month to be forthwith paid into said Police Relief and Pension Fund, and no other or further retention or deduction shall be made from such pay for any other fund or purpose whatever.

Sec. 13. Any *police, life, and health insurance fund, or any fund provided by law, heretofore existing in any county, city and county, city or town for the relief or pensioning of police officers, or their life or health insurance, or for the payment of a sum of money on their death, shall be merged with,* *paid into, and constitute a part of the fund created under the provisions of this act;* and no person who has resigned or been dismissed from said Police Department shall be entitled to any relief from such fund; provided that any person who, within one year prior to the passage of this Act, has been dismissed from the Police Department for incompetency or inefficiency. and which incompetency or inefficiency was caused solely by sickness or disability contracted or suffered while in service as a member thereof, and who has, prior to said dismissal, served for twelve or more years as such member, shall be entitled to all the benefits of this Act.

Sec. 15. All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed.

Sec. 16. This Act shall take effect from and after its passage.

Under this latter Act the Treasurer, the defendant here in error, refused to pay the money demanded by the administrator of Ward.

The Supreme Court of California decided that the latter Act is a valid law under the Constitution of the State of California; that it repeals the former Act and that *the latter Act does not violate the provisions of the Constitution of the United States, that no person shall be deprived of his property without due process of law and that* *public offices, under the laws of the State of California, are not held by contract or grant, and that* the State Legislature has full control over those created by statute. It denied the prayer of the petitioner, the plaintiff here in error, and dismissed the writ.

The plaintiff in error assigns quite a number of alleged errors, but there are only two which may involve Federal questions, and these are the contentions that the latter Act deprives a person of his property without due process of law, and that the latter Act impairs the obligation of a contract. On all other matters the decision of the Supreme Court of the State of California is final and not the subject of review by the National judiciary.

POINTS AND AUTHORITIES.

I

The provision in the former Act, the Act of April 1st, 1878, that upon the death of a Police officer the Treasurer shall pay one thousand dollars to his legal representative does not create a vested right or property, and therefore does not fall within the protection of that provision of the National Constitution, that a person shall not be deprived of his property without due process of law.

No right or property vests under this provision of this former Act, till death. If Ward had died before the passage of this Pension Bill, this latter Act, the right of property would have vested, and then it could not have been taken away. But before Ward's death the law might have been repealed or the statutory privilege changed, modified or destroyed.

It is a mere expectation of property in the future; a mere possibility or contingent interest. It is imperfect and inchoate, and is a mere expectancy. It is not a natural right. It is a mere creature of law, and the power that gave may modify, increase, diminish or take it away. It is a capacity to take, but not an estate or property.

It is like the expectancy or right of an heir to his inheritance. It depends upon positive law. No right or property vests in heir till death of ancestor. Prior to death Legislature may change or take it away from the heir or restrict the testamentary power.

Randall *vs.* Kreiger, 23 Wallace, p. 148.
Brenham *vs.* Story, 39 Cal., p. 185.
In re Lawrence, 1 Redfield, (Surrogate's Ct.), p. 318.
Merrill *vs.* Sherburne, 1 N. H., p. 214.
Guerin *vs.* Moore, 25 Minn., pp. 464–5.

Wallace *vs.* Reddick, 6 Western Rep., pp. 767, 773.
Morrison *vs.* Rice, 29 N. W. Rep., p. 169.

It is like the wife's right to dower which is imperfect, inchoate, and only a possibility or contingent interest. Dower does not vest till death of husband. Prior thereto may be changed or destroyed by legislation.

In re Lawrence, 1 Redfield, (Surrogate's Ct.), p. 318.
Merrill *vs.* Sherburne, 1 N. H., p. 214.
Barbour *vs.* Barbour, 46 Maine, pp. 13, 14.
Magee *vs.* Young, 40 Miss., pp. 169, 170.
Guerin *vs.* Moore, 25 Minn., pp. 464–5.
Randall *vs.* Kreiger, 23 Wallace, p. 148.
Boyd *vs.* Harrison, 36 Ala., N. S., p. 538–9.
Ware *vs.* Owens, 42 Ala., N. S., p. 212.
Bennett *vs.* Holmes, 41 Wis., p. 257.
Morrison *vs.* Rice, 29 N. W. Rep., p. 169.

It is like the right of pre-emption to public lands of the United States, which is a statutory privilege, and a capacity to take or acquire. It may be called an inceptive title, but no right or property vests, so far as the settler in occupation of the land is concerned, till the payment of the price. Prior thereto Congress may withdraw the public lands from entry or sale.

Hale *vs.* Gaines, 22 How. U. S. 121.
People *vs.* Shearer, 30 Cal., p. 645.
Hutton *vs.* Frisbie, 37 Cal., p. 475.
T. P. R. Co *vs.* Garcia, 64 Cal., p. 515.

It is like the right of redemption of property sold under judgment or execution. It is a mere creature of statute—a future right—a provision for future contracts—a provision out of which rights may grow. If a party redeems there is then a vested right or property; but at any time before he avails himself of the right or statutory privilege the Legislature may destroy or modify the right.

Tuolumne R. C. *vs.* Sedgwick, 15 Cal., p. 522.

The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee.

Merrill *vs.* Sherburne, 1 N. H., p. 214.

In proceedings for condemnation of land for public use, the law may be repealed before payment is made.

Lamb *vs.* Schottler, 54 Cal., 319.

II.

Officers, their emoluments, salaries, pensions, and *incidents are not contracts within those provisions of the Constitution of the United States and of the State of Calfiornia which prohibit legislation impairing the obligation of contracts.*

In America, public offices, and the duties, rights and services of offices, prospective salaries, emoluments and pensions, and all the incidents of office are not contracts express or implied, nor incorporeal hereditaments, nor grants, nor property, nor vested rights, as against the Government.

The incumbents have no proprietary or private right, property, interest or estate in them. They are not subjects of barter, sale or property. Officers are not the hired servants of a master. They may resign or lay down their trust at their pleasure. Offices are not created by contract or bargain, but are provided by law. The relations between officers and the State are not contractual. They cannot be sued for damages, for breach of contract. Their services do not partake of the nature of contract, nor have they the remotest affinity thereto. Police officers are public agents, or officers who represent the sovereignty of the State and the majesty of the law in the suppression of criminal disorders, the maintenance of peace and the protection of life, person, and liberty and property. Their duties are honorable. They are of the most useful and important character to all. Their proper discharge requires the noblest of virtues—bravery, honor, fidelity and integrity. They are executive officers of courts of justice. These offices, with all their incidents, are civil institutions, established by the State, to be employed for the internal government of the State. These officers and their incidents are exclusively public matters. They are instrumentalities which give efficacy and use to the sovereign powers of the commonwealth. They are not instituted for the benefit of the incumbent, but as public trusts for the public benefit of all. The office of policeman is not constitutional, but is solely statutory and, therefore, the office and the duties, privileges and rights which appertain thereto and prospective salaries, emoluments and pensions, and all its incidents, are subject to the absolute control of the Legislative Department, except as to matters covered by some express Constitutional restraint.

State *vs.* Dews, R. M., Charlton's Rep. (Ga), pp. 400, 401.

Miller *vs.* Kister, 68 Cal., p. 144.

Butler *vs.* Pennsylvania, 10 How., (U. S.) p. 416.

Com. *vs.* Bacon, 6 S. & R., p. 322.

Com. *vs.* Mann, 5 W. & S., p. 418.

Dartmouth College, *vs.* Woodward, 4 Wheaton, pp. 518, 629.

Connor *vs.* City of New York, 2 Sandford, p. 370.

Coffin vs. State, 7 Ind., p. 157.

Connor *vs.* Mayor of New York, 5 N. Y., p. 285.

Benford *vs.* Gibson, 15 Ala., p. 524.

Koontz *vs.* Franklin, 76 Pa. St., p. 157.

Co. Com'rs *vs.* Jones, 18 Minn., p. 202.

Williams *vs.* City of Newport, 12 Bush (Ky.), p. 438.

State *vs.* Douglass, 26 Wis., p. 432.

Alexander *vs.* McKenzie, 2 S. C. Law Rep., New Series (Richardson), pp. 81, 93.

Newton *vs.* Com., 100 U. S., p. 557-8.

Farrell *vs.* Bridgeport, 45 Conn., p. 195.

Smith *vs.* Mayor of New York, 37 N. Y., p. 520.

Donahue *vs.* County, etc., 100 Ill., p. 103-4.

Standford *vs.* Wingate, 2 Duvall's (Ky.), p. 443.

Knoup *vs.* Piqua Bank, 1 Ohio St., p. 616.

Toledo Bank *vs.* Bond, 1 Ohio St., p. 655-6.

Barker *vs.* City of Pittsbuig, 4 Barr, p. 49.

West River Bridge Co. *vs.* Dix, 6 How., p. 548.

Robb *vs.* Carter, 3 Central Rep., p. 731.

Officers take office with the knowledge and implied understanding that the office and its prospective compensation, duties, rights, pensions and incidents are subject to Legislative control.

Benford *vs.* Gibson, 15 Ala., p. 524.
State *vs.* Dews, R. M. Charlton's Rep. (Ga.). p. 427.
Miner *vs.* Solano Co., 26 Cal., p. 118.

For the reasons that the compensation is inseparably connected with the office, and the office and its incidents are a civil institution and means employed by the United States to execute their sovereign powers, a State cannot tax the compensation of an officer of the national Government.

Dobbins *vs.* Comr. of Erie Co., 16 Peters, p. 435.

For the same reasons Congress cannot tax the compensation of an officer of the State Government.

Collector *vs.* Day, 11 Wallace, p. 113.

Changing the law of descent and distribution does not impair the obligation of contracts unless the right has already vested by death.

In re Lawrence, 1 Redfield (Surrogate's Ct.), p. 318.

Repeal of the law giving the right of redemption from sales under judgment does not impair the obligation of contracts unless the party has already availed himself of the privilege.

Tuolumne R. Co. *vs.* Sedgwick, 15 Cal., p. 523.

The two dollars retained from the monthly pay under the former Act, the Act of April 1, 1878, the officer never had or owned It was not designed that he should. He never had any possession, power, control, use or disposition of the same. The law regards substance. It was taken by law to form a public fund. It was derived from taxation. It was public revenue and public funds in the custody of the Treasurer of the City and County of San Francisco, and by law taken therefrom and remained with the same person as Treasurer of the fund created in that Act. If the officer had it or saw it, it would make no difference; for if he contributed it, it would be like the contributions of citizens by way of taxation. After the contribution is made the citizen or officer has no property in it or in the fund. It is a public fund or revenue subject to public control.

This sum of one thousand dollars, payable to the legal representative under the former Act, the act of April 1, 1878, was not assignable by the police officer or subject to his control.

III.

The decision by the Supreme Court of California that the funds under the former Act, the Act of April 1st, 1878, are public funds and that public offices created by the laws of the State of California are not held by contract or grant, relate to public matters of the State which peculiarly appertain to State sovereignty. They are decisions under the principles of the general jurisprudence of the State.

IV.

There are other matters which may be entitled to some consideration. The powers, functions and duties of the Board of Police Pension Fund Commissioners under this latter Act are State powers, functions and duties. The powers, functions and duties of the Board created under the former Act are State powers, functions and duties. The funds provided for by both Acts are public funds, are *State* funds. Both funds are devoted to or appropriated for *State purposes.* Police officers are State officers and the maintenance of the peace and the protection of life, person and property are State purposes. It is State policy that the funds or revenue are used to promote. Both Acts relate to police officers. That which does not concern more than one locality is municipal; that which concerns the State is not municipal. The preservation of the peace is the prerogative, and sovereign duty of the State. Violations of criminal laws violate not the peace of the county, but the peace of the State. The prosecution is in the name of the people of the State, and before tribunals which are part of the Judicial Department of the State Government. Fines and penalties can be only remitted by the Governor of the State.

A police officer executes the laws of the State for the suppression of crimes and the protection of life, person and property. He is an agent of the State Government or Sovreignty. He acts in the capacity of a State officer or agent. It is a matter that concerns State policy and duties. The Legislature may localize the election or appointment of officers, or confine them to territorial limits if it deems it expedient. It may invest municipal officers with powers and duties for State purposes. When such an officer performs duties exclusively of a municipal character he acts in the capacity of, or as a municipal officer or agent, and when he performs duties that concerns State policy he acts in the capacity of, or as a State officer or agent. The Boards of Police Pension Fund Commissioners are State officers for State purposes. All affairs that concern State policy are under immediate control of the sovereignty of the State through the Legislative Department. In such matters of general concern the State may provide for agents or officers of its own appointment or election, and prescribe their duties or confer such powers on municipal officers except so far as restrained by some express constitutional provision. There is none applicable to this case.

People *vs.* Hurlbut, 24 Mich., pp. 63–103.
People *vs.* Mahaney, 13 Mich., p. 490.
Board of Park Com'r *vs.* Common Council of Detroit, 28 Mich., 235–6.
Burch *vs.* Hardwick, 30 Grattan, p. 24
State *vs.* Heinlen, 17 Pac. Rep., p. 177.
State *vs.* Kansas City, 17 Pac. Rep., 185.
City of Chicago *vs.* Wright, 69 Ill., p. 326.
People *vs.* Draper, 15 N. Y., (Ct of App.), p. 554.
Mayor *vs.* State, 15 My., p. 455–6.
Police Com'rs *vs.* City of St. Louis, 3 Bush (Ky.), p. 597.
Diamond *vs.* Cain, 21 La. An., p. 309.
State of Louisiana *vs.* Levi, 21 La. An., p. 538.
People *vs.* Draper, 35 Barb., p. 344.
People *vs.* Shepard, 36 N. Y., p. 285.

Farrell *vs.* City of Bridgeport, 45 Conn., p. 195.

Cobb *vs.* Portland, 55 Me., p. 383.

Andrews *vs.* King, 77 Me., p. 230.

People *vs.* Lynch, 51 Cal., p. 35.

Police officers, Chiefs and Superintendents of Police are State officers.

See above authorities.

Public revenue and funds, State, County or Municipal, may be appropriated by the State to such public uses or purposes as it may determine. If the law applies them to one use or purpose it may repeal or change the law or apply them to another public use or purpose. It is a sovereign right of appropriation. It is only restrained in the Constitution of the State of California in two instances—Public Schools and the State University—in which cases their revenue and funds are declared to be inviolably appropriated to those uses. Municipal funds are not strictly the private property of the County or Municipal Government. They are rather the property of the State.

Creighton *vs.* San Francisco, 42 Cal., p. 450.

Ex parte Reis, 64 Cal., p. 233.

Sangamon Co. *vs.* City of Springfield, 63 Ill., p. 70.
Aid Society *vs.* Reis, 71 Cal., p. 631.
Darlington *vs.* Mayor, 31 N. Y., 164.
Town of Guilford *vs.* B. of S. of Chenango Co., 18 Barb., p. 615.
U. S. *vs.* Railroad Co., 17 Wallace, p. 332.
New Orleans *vs.* Clark, 95 U. S., p. 654.
Palmer *vs.* Fitts, 41 Ala., p. 492.
Matter of the City of Buffalo, 68 N. Y., p. 171.
State, etc., *vs.* St. Louis Co. Court, 34 Mo., p. 570.
City of St. Louis *vs.* Shields, 52 Mo., p. 354.
Sutton *vs.* Ashbury, 41 Cal., p. 530.
Hart *vs.* Burnett, 15 Cal., p. 612.
Payne *vs.* Treadwell, 16 Cal., p. 233.
Blanding *vs.* Burr, 13 Cal., p. 351.
Beals *vs.* Amador Co., 35 Cal., pp. 632, 633.
San Francisco *vs.* Cannavan, 42 Cal., p. 558.
People *vs.* Kern, 27 N. Y., p. 189.
People *vs.* Alameda Co., 26 Cal., p. 649.
People *vs.* Pacheco, 27 Cal., p. 209.
Littlefield *vs.* Vernon, 41 N. Y., p. 123.